

# **CUSTOMS BULLETIN AND DECISIONS**

**Weekly Compilation of  
Decisions, Rulings, Regulations, Notices, and Abstracts  
Concerning Customs and Related Matters of the  
U.S. Customs Service  
U.S. Court of Appeals for the Federal Circuit  
and  
U.S. Court of International Trade**

**VOL. 32**

**SEPTEMBER 23, 1998**

**NO. 38**

*This issue contains:*

U.S. Customs Service

General Notice

U.S. Court of International Trade

Slip Op. 98-103

Slip Op. 98-122 Through 98-125

Abstracted Decisions:

Classification: C98/117 Through C98/134

## NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

**Please visit the U.S. Customs Web at:  
<http://www.customs.ustreas.gov>**

# U.S. Customs Service

## *General Notice*

DEPARTMENT OF THE TREASURY,  
OFFICE OF THE COMMISSIONER OF CUSTOMS,  
*Washington, DC, September 9, 1998.*

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

JOHN DURANT,  
(for Stuart P. Seidel, Assistant Commissioner,  
Office of Regulations and Rulings.)

---

### MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF NEODYMIUM-IRON-COBALT ALLOY INGOTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling relating to the tariff classification of neodymium-iron-cobalt-alloy ingots. These products are produced by melting the constituent materials in an electric induction furnace, then casting them into ingots. After importation, these ingots are reduced to powder form and used in making magnets. Notice of the proposed modification was published on July 29, 1998, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after November 23, 1998.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927-0760.

## SUPPLEMENTARY INFORMATION:

## BACKGROUND

On July 29, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 30, proposing to modify NY A86780, dated October 18, 1996, which in part classified neodymium-iron-cobalt alloy in subheading 7202.99.50, Harmonized Tariff Schedule of the United States (HTSUS), a provision for other ferroalloys. One comment was received in response to this notice, supporting the proposal. The commenter agrees with Customs that despite the requisite metallurgy, because the neodymium-iron-cobalt iron alloy ingots were said to be used after importation in the manufacture of magnets, evidence was lacking that they were commonly used as an additive in the manufacture of other alloys or as deoxidants, desulfurizing agents or for similar uses in ferrous metallurgy, as required by the Chapter 72, Note 1(c), HTSUS, definition of *Ferroalloys*. The commenter further agrees that because the merchandise is a cast alloy ingot, the composition of which is approximately 60 percent iron, by weight, subheading 7325.99.50, HTSUS, other cast articles of iron or steel, represents the correct classification.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NY A86780 to reflect the proper classification of neodymium-iron-cobalt ingots in subheading 7325.99.50, HTSUS, a provision for other cast articles of iron or steel. HQ 960824 modifying NY A86780 is set forth as the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: September 3, 1998.

JOHN E. ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachment]



## [ATTACHMENT]

DEPARTMENT OF THE TREASURY,

U.S. CUSTOMS SERVICE,

Washington, DC, September 3, 1998.

CLA-2 RR:CR:GC 960824 JAS

Category: Classification

Tariff No. 7325.99.50

MR. FRED BREWER

MAGNEQUENCH INTERNATIONAL, INC.

6435 Scatterfield Rd.

Anderson, IN 46013

Re: NY A86780 Modified; neodymium-iron-cobalt alloy ingots; powdered product used to make magnets; ferroalloy, Chapter 72, Note 1(c); Heading 7202; steel, Chapter 72, Note 1(d); cast articles of iron or steel, Heading 7325.

DEAR MR. BREWER:

NY A86780, which the Customs Director, National Commodity Specialist Division, New York, issued to a Customs broker on your behalf on October 18, 1996, in part classified M4392 neodymium-iron-cobalt alloy ingots in subheading 7202.99.50, Harmonized Tariff Schedule of the United States (HTSUS) as other ferroalloys.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NY A86780 was published on July 29, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 30. One comment was received by counsel on your behalf in support of the proposed modification. The classification of neodymium powder also discussed in NY A86780 is not in issue here.

**Facts:**

The merchandise in question, M4392 neodymium-iron-cobalt alloy, is made by melting either pure neodymium or eutectic (88% neodymium and 12% iron) neodymium ingots in an electric induction furnace with iron in the form of steel billets, cobalt in the form of broken cathodes, and irregularly shaped ferrobore pieces. The resulting alloy is cast into ingots, typically measuring 6 inches in diameter and 10 inches in length. This is the condition of the product as imported. The chemistry of this imported ingot is 27-29% rare earth elements (typically neodymium), 63% iron, 4.7-5.3% cobalt, and 1% other elements. After importation, the ingots are melted and ejected onto a chilled rotating wheel in a jet cast process. This rapid solidification cools or quenches the molten metal into flakes which are then crushed into powder form. The powder is used to make magnets for computers, anti-lock brakes, etc.

The provisions under consideration are as follows:

<b>7202</b>	Ferroalloys:
<b>7202.99</b>	Other
<b>7202.99.50</b>	Other * * * 5 percent <i>ad valorem</i>
	* * * * *
<b>7325</b>	Other cast articles of iron or steel:
<b>7325.99</b>	Other
<b>7325.99.50</b>	Other * * * 3.5% <i>ad valorem</i>

**Issue:**

Whether the neodymium-iron-cobalt alloy is a ferroalloy for tariff purposes.

**Law and Analysis:**

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Chapter 72, Note 1(c), HTSUS, in relevant part, defines *Ferroalloys* to include alloys in pigs, blocks, lumps, or similar primary forms, or in forms obtained by continuous casting,

commonly used as an additive in the manufacture of other alloys or as deoxidants, desulfurizing agents or for similar uses in ferrous metallurgy and generally not usefully malleable, containing by weight 4% or more of the element iron and a total of more than 10% of other elements, excluding carbon.

The percentage of iron and rare earth elements brings the product within the chemical composition defined in Note 1(c). However, literature submitted in connection with the ruling request that resulted in NY A86780 contains the following statement with respect to the imported neodymium-iron-cobalt alloy ingot that, after importation, is reduced to flakes, then to powder form "We use this powder to produce fully-dense 'MQ2' and 'MQ3' magnets. Annealed, the powder is sold as 'MQP' to customers who wish to make their own bonded magnets or is used in-house to produce our line of 'MQ1' bonded magnets." The company specification for the product designated M4392 states it "[c]overs a purchased cast metal product to be used in the manufacture of Magnequench magnet material." Lacking other information, these statements compel the conclusion that the imported product is not commonly used as an additive in the manufacture of other alloys or as deoxidants, desulfurizing agents or for similar uses in ferrous metallurgy. The product is not a ferroalloy as defined in Chapter 72, Note 1(c), HTSUS.

Heading 7224 covers other alloy steel in ingots or other primary forms. However, the ingots of this heading are subsequently rolled or forged generally into semifinished products such as blooms, billets, slabs, etc., but sometimes directly into bars, sheets or other finished products. The post-importation processing, as described in this case, does not support classification of this product in any provision of heading 7224.

At importation, M4392 neodymium-iron-cobalt alloy ingots are cast articles. Heading 7325, other cast articles of iron or steel, covers all cast articles of iron or steel, not elsewhere specified or included, other than recognizable parts of machinery or mechanical appliances, or castings considered, for tariff purposes, as being unfinished articles of other headings. Lacking evidence of a more specific provision for the ingots in question, we conclude that they are cast articles of heading 7325.

#### *Holding:*

Under the authority of GRI 1, M4392 neodymium-iron-cobalt alloy ingots are provided for in heading 7325. They are classifiable in subheading 7325.99.50, HTSUS. NY A86780, dated October 18, 1996, is modified accordingly.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN E. ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

# United States Court of International Trade

One Federal Plaza  
New York, N.Y. 10007

## *Chief Judge*

Gregory W. Carman

## *Judges*

Jane A. Restani  
Thomas J. Aquilino, Jr.  
Richard W. Goldberg  
Donald C. Pogue

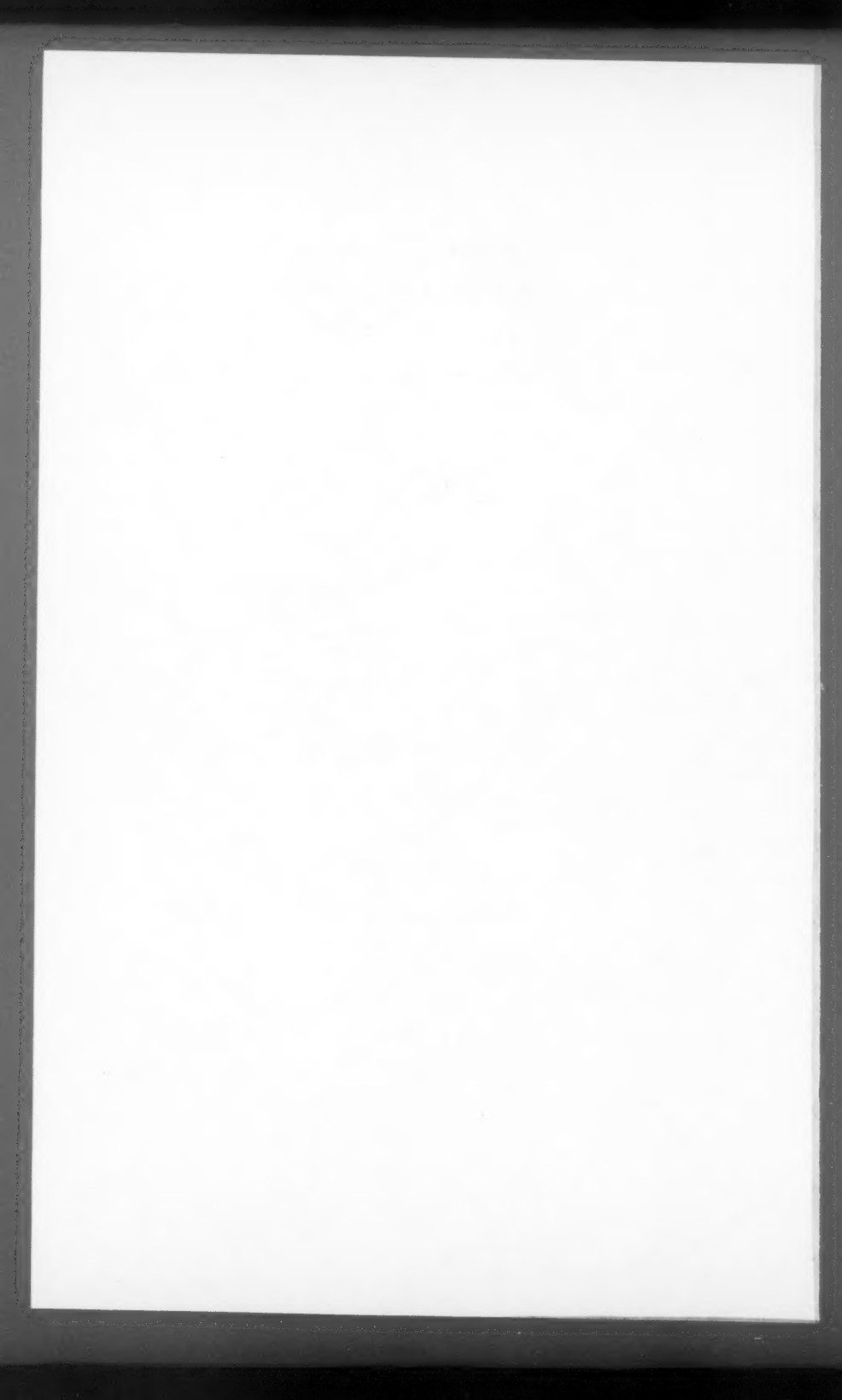
Evan J. Wallach  
Judith M. Barzilay  
Delissa Anne Ridgway

## *Senior Judges*

James L. Watson  
Herbert N. Maletz  
Bernard Newman  
Dominick L. DiCarlo  
Nicholas Tsoucalas  
R. Kenton Musgrave

## *Clerk*

Raymond F. Burghardt



# Decisions of the United States Court of International Trade

---

## PUBLIC VERSION

(Slip Op. 98-103)

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW LOCAL 1283 AND EMPLOYEES AND FORMER EMPLOYEES OF JOHNSON CONTROLS BATTERY GROUP INC., PLAINTIFFS *v.* ROBERT REICH, SECRETARY OF LABOR, DEFENDANT

Court No. 96-04-01141

[Plaintiffs' Motion for Judgment on the Agency Record denied.]

(Decided July 17, 1998)

*Jordan Rossen*, General Counsel International Union, UAW; *Charles M. Gayney*, Associate General Counsel; *Leonard Page*, Associate General Counsel; *Stephen A. Yokich*, Associate General Counsel, for Plaintiffs.

*Frank W. Hunger*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (Randi-Sue Rimmerman); *Michele W. Curran*, Of Counsel, Office of the Solicitor, United States Department of Labor, for Defendant.

## OPINION

### I

#### INTRODUCTION

WALLACH, *Judge*: This case is before this Court on Plaintiffs' Motion for Judgment on the Agency Record pursuant to USCIT R. 56.1. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1283, and Employees and Former Employees of Johnson Controls Battery Group, Inc. ("Plaintiffs") challenge the Department of Labor's ("DOL") determination that the former employees of the Johnson Controls Battery Group, Inc. ("Johnson Controls") plant in Louisville, Kentucky ("Louisville plant") are not eligible for certification because increased imports did not contribute im-

portantly to the workers' separation from employment, as required by Section 222 of the Trade Act of 1974, amended by the Omnibus Trade and Competitiveness Act of 1988 (P.L. 100-418), 19 U.S.C. § 2272(a)(3) ("Trade Act"). See *Johnson Controls Battery Group, Inc. Louisville, Kentucky; Notice of Negative Determination of Reconsideration On Remand*, 62 Fed. Reg. 31,626 (Dep't Labor 1997) ("Notice of Negative Determination of Reconsideration On Remand"). DOL's denial of certification is supported by substantial evidence and is in accordance with the trade adjustment assistance provisions of the Trade Act. Therefore, DOL's final determination is affirmed.

## II

### BACKGROUND

The purpose of the trade adjustment assistance program is "to offer unemployment compensation, training, job search and relocation allowances, and other employment services to workers who lose their jobs because of import competition." *Former Employees of Parallel Petroleum Corp. v. United States Secretary of Labor*, 14 CIT 114, 118, 731 F. Supp. 524, 527 (1990).

In order to certify a group of workers as eligible to apply for trade adjustment assistance under Section 222 of the Trade Act, the Secretary of Labor ("Secretary") must determine:

- (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
- (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
- (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272(a) (1994).

In order to receive trade adjustment assistance benefits, Plaintiffs must satisfy all three requirements of Section 222 of the Trade Act. See, e.g., *Former Employees of Bass Enterprises Production Co. v. United States*, 13 CIT 68, 70, 706 F. Supp. 897, 900 (1989) ("[F]ailure to satisfy any one of the three criteria for certification of workers for assistance will result in denial of adjustment assistance."); *Abbott v. Donovan*, 8 CIT 237, 239, 596 F. Supp. 472, 474 (1984) ("If any of these three statutory conditions does not exist, the Secretary must deny certification.").

On August 22, 1995, pursuant to 19 U.S.C. § 2271, a petition for certification of eligibility for trade adjustment assistance was filed on behalf of the former employees of the Louisville plant. Petition for Trade Adjustment Assistance filed by Puckett on Aug. 22, 1995, Administrative Record ("AR") 2 ("Petition for Trade Adjustment Assistance"). On October 13, 1995, DOL denied certification because increased imports did

not contribute importantly to the separation of Louisville employees. See *Johnson Controls Battery Group, Inc. Louisville, Kentucky; Negative Determination Regarding Eligibility To Apply for Worker Adjustment Assistance*, AR 15 ("Negative Determination"); *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 60 Fed. Reg. 55,063 (Dep't Labor 1995). DOL's investigation revealed that production had been transferred domestically and the firm's sales, production and employment had not declined prior to the implementation of the transfer. *Negative Determination*, AR 16.

On November 13, 1995, the employees petitioned for reconsideration of the negative determination. Letter from Puckett to Trunzo dated Nov. 13, 1995, AR 18-19. The application noted that workers from three other Johnson Controls' production facilities that had closed in the preceding 18 months had been certified after an initial denial. *Id.* It alleged that production from those facilities has been shipped to a new facility in Torreon, Mexico which produced new and aftermarket batteries. *Id.* at 18. It also asserted that batteries from the Louisville plant were being shipped to Mexico and returned to the United States in new cars. *Id.*<sup>1</sup>

On November 30, 1995, DOL granted the request for reconsideration because "[t]he petitioner [had presented] evidence that the subject firm shifted production to a foreign owned facility." *Johnson Controls Battery Group, Inc. Louisville, Kentucky; Notice of Affirmative Determination Regarding Application for Reconsideration*, 60 Fed. Reg. 63,733 (Dep't Labor 1995).

On February 6, 1996, the Secretary affirmed the denial of certification. *Johnson Controls Battery Group, Inc. Louisville, KY; Notice of Negative Determination on Reconsideration*, 61 Fed. Reg. 6658, 6659 (Dep't Labor 1996). DOL concluded it was irrelevant whether batteries from Mexico were entering the United States in new automobiles, as Plaintiffs alleged, because DOL was statutorily required to examine whether imports of articles like or directly competitive with the automobile batteries produced at the Louisville plant contributed importantly to Plaintiffs' separation. See *id.* at 6658.

In accord with its general practice, DOL surveyed the Louisville plant's customers to determine whether the "contributed importantly" test was satisfied. See *id.* DOL found that the Louisville plant's customers did not increase their purchases of imports while decreasing their purchases from the Louisville plant. *Id.* at 6658-59. DOL also found there was no evidence that the Louisville plant imported automobile batteries. *Id.* at 6659. In addition, it determined that the value of United States imports of automobile batteries declined from 1993 to 1994 and

<sup>1</sup> The petitioner submitted the following information with the application for reconsideration: a letter from Rep. Bernard Sanders of Vermont regarding the transfer of production from Johnson Controls' plant in Vermont to Mexico, minutes of meetings between UAW and Johnson Controls representatives regarding production at Johnson Controls' plant in Mexico, a request for Louisville personnel to assist the company in training production and maintenance personnel in Mexico, information on Johnson Controls' production and sales in Mexico and bills of lading suggesting Johnson Controls was shipping batteries from Louisville to Mexico. Attachments to Request for Reconsideration dated Nov. 13, 1995, Confidential Version of the Original Administrative Record ("CAR") 23-104.

from October 1993 to September 1994 to the same twelve-month period in 1994-95. *Id.*

As for the workers at the other three plants that were certified, DOL stated that "[e]ach worker group petition is determined for certification on its own merits. The Trade Act was not intended to provide TAA benefits to everyone who is in some way affected by foreign competition but only to those who experienced a decline in sales or production and employment and an increase in imports of like or directly competitive products which 'contributed importantly' to declines in sales or production and employment." *Id.*

On April 24, 1996, Plaintiffs challenged DOL's negative determination in this Court. On December 12, 1996, DOL requested a voluntary remand to more fully investigate whether the workers met the eligibility criteria. Defendant's Memorandum In Opposition at 7-8. On February 4, 1997, this Court remanded this action to DOL to conduct an additional investigation of Plaintiffs' application for certification and ordered Plaintiffs to submit to DOL any additional information warranting consideration.

On remand, DOL submitted a supplemental questionnaire to Johnson Controls. Letter from Poole to Bagley dated Apr. 29, 1997 with attachment, Supplemental Confidential Administrative Record ("SCAR") 2-3. DOL asked whether Johnson Controls had shifted any battery production from Louisville to Mexico, and whether it had imported automobile batteries from Mexico or any other foreign source like or directly competitive with batteries made at the Louisville plant. *Id.* at 3. DOL also requested information on the percentage of sales from the Louisville plant to each of its customers from January to September 1995. *Id.* Johnson Controls responded that no production had been shifted from the Louisville plant to Mexico, noted that production of automotive batteries sold to Gonher de Mexico from Louisville were transferred to its St. Joseph, Missouri facility, provided the percentage of battery sales to each plant customer, and explained why imported batteries from Johnson Controls' Mexican facility were different from batteries produced at the Louisville plant. Johnson Controls Completed Supplemental Questionnaire dated May 5, 1997, SCAR 5 ("Johnson Controls Completed Supplemental Questionnaire").

On May 16, 1997, DOL affirmed its original denial of certification. *Notice of Negative Determination of Reconsideration On Remand*, 62 Fed. Reg. at 31,626. DOL explained that it granted certification petitions for former workers at Johnson Controls' Garland, Texas; Bennington, Vermont; and Owosso, Michigan plants because their customers reported increased imports of aftermarket batteries, the product those plants produced, during the relevant time period. *Id.* at 31626. As a result, "it was determined that imports 'contributed importantly' to worker separations." *Id.* By contrast, the Louisville plant customers were new car producers purchasing original equipment, automotive batteries, rather than aftermarket batteries. *Id.* Finally, DOL found that the remand in-



vestigation confirmed that battery production at the Louisville plant was shifted to another Johnson Controls facility in the United States. *Id.*

On August 7, 1997, Plaintiffs submitted a Reply In Opposition To Defendant's Negative Determination on Remand ("Plaintiffs' Reply"). Plaintiffs challenge DOL's determination that the former employees of the Louisville plant are not eligible for certification because increased imports did not contribute importantly to the workers' separation from employment.

Plaintiffs assert that DOL's determination that the workers are ineligible for certification is not supported by substantial evidence on the record and is not otherwise in accordance with law. Specifically, Plaintiffs contend that DOL failed to consider the closing of the Louisville plant in relation to, and as part of, the closing of Johnson Controls battery plants in Garland, Bennington, and Owosso in 1994 and 1995. *See* Plaintiffs' Brief at 2 and 6. In addition, Plaintiffs allege that DOL failed to adequately investigate their claims, improperly grouped distinct battery categories in its import analysis and placed unwarranted reliance on the responses of Johnson Controls. *Id.* Finally, Plaintiffs claim that "[w]hile [DOL's] decision to take a 'fresh look' at the case was laudable, its most recent Negative Determination wholly fails to answer the legal and factual issues raised by plaintiffs." Plaintiffs' Reply at 1. Plaintiffs move this Court to remand this case to the Secretary and reopen the administrative record for a full and fair investigation.

### III

#### JURISDICTION AND STANDARD OF REVIEW

Pursuant to 19 U.S.C. § 2395(c) (1994) and 28 U.S.C. § 1581(d)(1) (1994), this Court has exclusive jurisdiction to review DOL's final determination regarding the eligibility of workers for adjustment assistance under section 223 of the Trade Act, 19 U.S.C. § 2273 (1994).

The Court decides an adjustment assistance case based on the administrative record before it. 28 U.S.C. § 2640(c) (1994). As set forth in 19 U.S.C. § 2395(b) (1994):

[t]he findings of fact by the Secretary of Labor \* \* \* if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to such Secretary to take further evidence, and such Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

*Id.*; *see Former Employees of Stanley Smith, Inc. v. United States Secretary of Labor*, 967 F. Supp. 512, 515 (CIT 1996). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The Court will substantially defer to the agency's "chosen technique, only remanding

a case if that technique is so marred that the Secretary's finding is arbitrary or of such nature that it could not be based on 'substantial evidence'." *Stidham v. United States Dep't of Labor*, 11 CIT 548, 551, 669 F. Supp. 432, 435 (1987) (quoting *Retail Clerks Int'l Union v. Donovan*, 10 CIT 308, 312 (1986) (quoting *United Glass and Ceramic Workers of North America v. Marshall*, 584 F.2d 398, 405 (D.C.Cir. 1978)).

#### IV

#### DISCUSSION

##### A

#### DOL USED THE "APPROPRIATE SUBDIVISION" TO DETERMINE ELIGIBILITY FOR TRADE ADJUSTMENT ASSISTANCE

Plaintiffs claim that DOL arbitrarily rejected Plaintiffs' definition of the "appropriate subdivision" of the firm used in evaluating whether the former employees of the Louisville plant were eligible for trade adjustment assistance.<sup>2</sup> See Plaintiffs' Brief at 5-8. Plaintiffs contend DOL should have considered the closing of the Louisville plant "in relation to, and as part of, a series of battery plants that Johnson Controls closed in 1994 and 1995." Plaintiffs' Brief at 2.

Plaintiffs claim that "[b]oth the identity of the product and its transferability<sup>3</sup> among different facilities support [their] argument that the appropriate subdivision for the Louisville plant should include the Garland, Bennington and Owosso plants." Plaintiffs' Brief at 8. Plaintiffs contend that Louisville was "merely the last plant in a downsizing 'daisy chain.'" *Id.*

Under the Trade Act, DOL may certify a group of workers as eligible for trade adjustment assistance benefits upon finding, *inter alia*, that the workers in a "firm or an appropriate subdivision of the firm" have been adversely affected by "increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof \* \* \*." Trade Act, § 222(3), 19 U.S.C. § 2272(3) (1994).

DOL regulations define "appropriate subdivision" as

an establishment in a multi-establishment firm which produces the domestic articles in question or a distinct part or section of an establishment (whether or not the firm has more than one establish-

<sup>2</sup> Although Plaintiffs raised this issue for the first time in their Rule 56.1 Motion, the agency subsequently addressed the issue in the voluntary remand that followed the filing of Plaintiffs' motion. See Petition for Trade Adjustment Assistance, AR 2 and Letter from Puckett to Trunzo dated Nov. 13, AR 18-19; *Notice of Negative Determination of Reconsideration On Remand*, 62 Fed. Reg. 31,626. Since DOL had the opportunity to consider the matter and state its reasons for its determination, the Plaintiffs are not estopped from raising this claim before the Court. See *Philipp Brothers, Inc. v. United States*, 10 CIT 76, 78, 630 F. Supp. 1317, 1319 (1986) ("The general rule is that 'administrative exhaustion of remedies is required before a litigant will be allowed to raise a claim via a civil action.'" (citations omitted); *Magnesium Corp. v. United States*, 938 F. Supp. 885, 906 (CIT 1996) ("This Court would usurp the agency's function if it examined [the agency's] determination upon a ground not presented before [the agency], and for which [the agency] did not have an opportunity to consider the matter and to state the reason for its determination.") Accordingly, the Court can address this issue on the merits.

<sup>3</sup> Plaintiffs contend that Johnson Controls has demonstrated its ability to transfer battery production from one facility to another. Plaintiffs' Brief at 6. They refer to the UAW president's description of the recent history of domestic plant closings and claim that part of the battery production was transferred to Johnson Controls' plant in Torreon, Mexico. *Id.* (citing Letter from Puckett to Trunzo dated Nov. 13, AR 18).

ment) where the articles are produced. The term *appropriate subdivision* includes auxiliary facilities operated in conjunction with (whether or not physically separate from) production facilities.

29 C.F.R. § 90.2 (1995).

"It is the Secretary's function to choose a subdivision that best effectuates the purposes of the Trade Act in light of the circumstances of the individual case." *Int'l Union v. Marshall*, 584 F.2d 390, 397 (D.C. Cir. 1978). However, "when a petitioner under a government benefits program puts forward an interpretation of a legislative provision that is arguably consonant with the statutory language, he is at least entitled to a reasoned statement why the administrator will not adopt that interpretation." *Id.* at 396. "The mechanical adoption of the plant as the appropriate subdivision without reasoned analysis is improper." *Lloyd v. United States Dep't of Labor*, 637 F.2d 1267, 1275 (9th Cir. 1980). DOL must analyze the underlying facts and explain why, reasonably based upon those facts, it would not include another facility within what the agency determines to be the "appropriate subdivision". If it does so, under the required standard of deference to the Secretary's finding, the Court must uphold DOL's decision as supported by substantial evidence. *See id.* (citing 19 U.S.C. § 2322(b) (Secretary's findings shall be conclusive if supported by substantial evidence)).

In its remand decision, DOL did provide an explanation for treating the workers from the Louisville plant differently than the workers from the Garland, Bennington and Owosso plants. *See Notice of Negative Determination of Reconsideration On Remand*, 62 Fed. Reg. 31,626. According to DOL, the plants had different customer bases because the Louisville plant produced original equipment automotive batteries while the other plants produced aftermarket batteries. *Id.* DOL's explanation constitutes the reasoned analysis required under *Lloyd*.<sup>4</sup> There was substantial evidence in the record to support this conclusion.

## B

THE TECHNIQUE USED BY DOL TO DETERMINE WHETHER INCREASED IMPORTS CONTRIBUTED IMPORTANTLY TO THE SEPARATION OF WORKERS WAS NOT SO MARRED THAT DOL'S FINDINGS WERE ARBITRARY OR OF SUCH A NATURE THAT IT COULD NOT BE BASED ON SUBSTANTIAL EVIDENCE

Plaintiffs argue that DOL's industry analysis is incomplete and conducted in an arbitrary manner. Plaintiffs' Brief at 11. Plaintiffs claim that DOL's reliance on its Office of Trade Adjustment Assistance market segment analysis to measure the value of imports from 1991 to 1995 is flawed for two reasons. *Id.* at 9. First, they say the analysis does not provide any data or the requisite comparison with domestic automobile battery production for the same time period. *See Id.* at 9-10. Plaintiffs

<sup>4</sup>In *Pemberton v. Marshall*, 639 F.2d 798, 801 (D.C. Cir. 1981), the court held that "[t]he only relevant concern in determining whether a facility is part of the appropriate subdivision is whether it also produces the articles in question." Since DOL's explanation is based upon an analysis of this factor, it is also in accord with the analysis required by law.

concede that the absolute values for both imports and domestic production may have declined during that time period; however, they contend that the relative market share of imports may have increased. *Id.* at 9. Second, according to Plaintiffs, DOL gave a "patently misleading" appearance of declining imports by adding together, without explanation, the increase in the value of small battery<sup>5</sup> imports and the substantial decrease in the value of large battery<sup>6</sup> imports. *See id.* at 10-11 and Plaintiffs' Exhibits 4 and 4A. Plaintiffs argue that instead of combining the value of all United States imports of automotive batteries to determine the value of imports during the relevant time period DOL should have examined imports of small batteries separately from imports of large batteries. Plaintiffs' Brief at 10. Plaintiffs contend that DOL should have analyzed the impact of the increase in small battery imports on the sales of batteries from the Louisville plant.<sup>7</sup> *See id.* at 10-11 and Plaintiffs' Reply at 2.

In addition, Plaintiffs question the factual basis for DOL's conclusion that import competition did not play a part in the closure of the Louisville plant because two customers' plants, one allegedly Louisville's second largest customer, did not submit responses to DOL's customer survey. *See* Plaintiffs' Brief at 12 and Plaintiffs' Reply at 1. Plaintiffs claim they are entitled to an explanation "why the [customer] responses are missing or why they allegedly can't be used." Plaintiffs' Brief at 12.

Under DOL's regulations, "increased imports" means that "imports have increased either absolutely or relative to domestic production compared to a representative base period." 29 C.F.R. 90.2 (1995). "In determining whether increased imports contributed importantly to the separation of the workers, [DOL] often employs a 'dual test' which looks to whether the subject company's customers reduced purchases from that company and at the same time increased purchases of competitive imports." *United Steelworkers v. United States Secretary of Labor*, 17 CIT 1188, 1190 (1993). While this test "is not \* \* \* very sophisticated," this court has found it "a reasonable means of ascertaining a causal link between imports and separations." *Id.* (quoting *United Glass and Ceramic Workers v. Marshall*, 584 F.2d 398, 405-06 (D.C. Cir. 1978)). The casual link needed is "a direct and substantial relationship between increased imports and a decline in sales and production." *Id.* (quoting *Estate of Finkel v. Donovan*, 9 CIT 374, 382, 614 F. Supp. 1245, 1251 (1985) (citation omitted)).

Here, DOL mailed survey questionnaires to the companies Johnson Controls identified as its major declining customers. *See* Page of Johnson Controls Completed DOL Business Confidential Data Request List-

<sup>5</sup> Lead-acid batteries under 6 kilograms.

<sup>6</sup> Lead-acid batteries over 6 kilograms.

<sup>7</sup> According to Plaintiffs, the data indicates a significant increase in the import of small batteries up to and including the base period. Plaintiffs' Brief at 11. For example, the value of these imports increased 78% from 1991 to 1994. *Id.* At oral argument, Plaintiffs conceded that the import statistics relied upon in their brief on batteries weighing less than six kilograms are not in the record. Since review is confined to the administrative record, the Court will not consider the claim that such data exists or any arguments solely arising from it. *See* 19 U.S.C. § 2395 (1994); *Woodrum v. Donovan*, 4 CIT 46, 54, 544 F. Supp. 202, 208 (1982).

ing Major Declining Customers, CAR 12 and Fax Transmittal Sheets and Cover Letters from Poole to Johnson Controls Major Declining Customers and Fax Transmission Report, CAR 109-120.<sup>8</sup> These companies were Customer 1, Customer 2, Customer 3, Customer 4, and Customer 5. See Page of Johnson Controls Completed DOL Business Confidential Data Request Listing Major Declining Customers, CAR 12. DOL only received response from three companies: Customers 1, 2 and 5. See Completed Surveys, CAR 123-31. Johnson Controls rather than Customer 4 responded to that company's questionnaire. See Johnson Controls Response, CAR 121-22. As a result, DOL excluded Customer 4's information from its analysis. See Handwritten Notes, CAR 132. The record does not contain a response from Customer 3.<sup>9</sup> Therefore, DOL only considered data on three of the five Louisville plant customers.<sup>10</sup>

Based on the definition of "increased imports", the key information to establish the causal link necessary is the increase or decrease in customer purchases of imports in comparison to purchases from the Louisville plant. The other general statistical information on automotive battery imports that DOL cites would not prove that imports were the direct and substantial cause of the closure of the plant. Therefore, the missing information on domestic automobile battery production and lack of differentiation between small and large battery imports in the general statistical information is irrelevant. However, deficiencies in gathering information from the customer surveys are relevant and critical to determining if a causal link existed.

Here, DOL failed to gather information from two of the five customers that were sent surveys, including Customer 4, the plant's second largest customer from January through September 1995.<sup>11</sup> See Completed Survey, CAR 121-22; Handwritten Notes, CAR 132; Johnson Controls Completed Supplemental Questionnaire, SCAR 5. This deficiency, however, is not sufficient to find the customer survey technique was arbitrary or not based upon substantial evidence.

Although DOL has not articulated its use of the "dual test" to determine if imports contributed importantly to the separation of Louisville workers, the technique DOL applied of mailing questionnaires to Louisville customers to determine if their purchases of imports increased relative to purchases of Louisville batteries clearly is the "dual test." See *United Steelworkers v. United States Secretary of Labor*, 17 CIT at 1190.

<sup>8</sup> Note that the facsimile transmission report confirms that all but the Customer 1 survey were sent out. However, since a response was received from Customer 1, the Court infers that the survey was sent. See Fax Transmission Report, CAR 119-20; Completed Survey, CAR 131.

<sup>9</sup> In oral argument, Defendant's counsel explained that DOL did not use the information supplied by Johnson Controls for Customer 4 because it did not have the same "assumption of veracity" as information coming directly from the company.

<sup>10</sup> Customer 2 reported no purchases from foreign firms and an increase in purchases from Johnson Controls and other domestic firms from 1993 to 1994 and from January to September 1994 to January to September 1995. Completed Survey, CAR 129. Customer 5 reported no purchases from foreign or other domestic firms and an increase in purchases from Johnson Controls from 1993 to January through September 1995. Completed Survey, CAR 125. Customer 1 reported no change in the amount of purchases from Johnson Controls, other domestic firms and foreign firms between 1993 and 1994 and from January through September 1994 to the same period in 1995. Completed Survey, CAR 131.

<sup>11</sup> This time period is the most recent period relevant to the investigation. See Johnson Controls Completed Supplemental Questionnaire, SCAR 5.

Whether the results of the dual test constitute sufficient evidence for the denial of eligibility for trade adjustment assistance depends on the level of sales or sales decline accounted for in the record. See *Local 167 v. Marshall*, 643 F.2d 26, 31 (1st Cir. 1981) (survey accounted for 49% and 68% of sales during relevant period); *United Glass and Ceramic Workers of North America v. Marshall*, 584 F.2d 398, 403 (D.C. Cir. 1978) (survey accounted for 21.5% and 38.3% of sales during relevant period); *Stipe v. United States Dep't of Labor*, 9 CIT 543, 544 (1985) (survey accounted for 94.9% and 82.4% of sales decline during relevant period); *Estate of Finkel v. Donovan*, 9 CIT 374, 381, 614 F. Supp. 1245, 1250-51 (1985) (customers responding to survey accounted for "substantial percentage" of lost sales during relevant period); *Retail Clerks Int'l Union v. Donovan*, 10 CIT 308, 312 (1986) (surveyed customer accounted for nearly all sales decline).

Although this court has not established a specific level of sales, or sales decline, for which an account must be made in the record, it has found particular samplings insufficient. See *Kelley v. United States Dep't of Labor*, 10 CIT 250, 252, 633 F. Supp. 1374, 1376 (1986), *vacated on other grounds*, 812 F.2d 1378 (Fed. Cir. 1987) (samplings accounting for only 3% of company's net sales decline were insufficient support for denial of trade adjustment assistance); *Smith v. Brock*, 12 CIT 1009, 1013, 698 F. Supp. 938, 941 (1988) (customers responding represented only 30% of total loss in sales and record lacked information from two firms with greatest decline in purchases).

Here, the percentage of customers that responded to the survey was sufficient for the 1995 period. Based upon percentages provided by Johnson Controls, the customers that responded to the survey represented 54.6% of the plant's customer base during January through September 1995. See Defendant's Response To The Court's Order of June 25, 1998.<sup>12</sup> This percentage is well within the percentages this court has found sufficient on other occasions. Therefore, the customer surveys considered by DOL were sufficient for the most recent period, 1995.

As for the other relevant time periods, 1993 and 1994, the record does not contain information of what percentage of sales the customer responses represented. This deficiency is not fatal, however, because gathering data from Customers 3 and 4 would not have made a difference. Even if the data from those customers would have shown they increased their imports and decreased their purchases from Johnson Controls, such a decrease in the plant's sales had no effect because the plant's sales, production and employment increased from fiscal year 1993 to

<sup>12</sup> On June 25, 1998, the Court ordered Defendant to file a supplemental brief addressing "what percentage of the [Louisville plant's] sales are represented by the customer responses received by [DOL]." On June 30, 1998, Defendant responded that based upon information in the record "customer responses received by the Department of Labor [sic] the period January through September 1995 represent 54.6 percent of the plant's customer base." Defendant's Response To The Court's Order Of June 25, 1998. Defendant also conceded that "[t]he administrative record does not contain sufficient information from which to extract the percentages requested for [the other relevant time periods,] fiscal years 1993 and 1994." Plaintiffs declined an opportunity to respond. The Court will rely upon Defendant's calculations because they are derived from information in the administrative record. See *Verson v. United States*, Slip Op. 98-30 at 10-11, 1998 WL 200278, at \*4 (CIT 1998) ("It is axiomatic that, absent surprise or legitimate evidentiary objections, counsel may use properly admitted evidence in any illustrative manner so long as it is relevant.").

1994. See Johnson Controls Completed DOL Business Confidential Data Request, CAR 8. Therefore, even if Customers 3 and 4 had increased their imports, those lost sales must have been compensated for by increased sales to other plant customers. As a result, the survey responses were sufficient. The technique used here was not so marred that DOL's findings were arbitrary or of such a nature that it could not be based on substantial evidence.

### C

#### DOL ADEQUATELY INVESTIGATED PLAINTIFFS' CLAIMS

Plaintiffs contend that DOL placed unwarranted reliance on responses from Johnson Controls about its plans for battery production in this country and Mexico. Plaintiffs' Brief at 11 and 14. Plaintiffs argue that DOL failed to properly investigate the sourcing of Johnson Controls' battery production and the significance of its Mexican operations. *Id.* at 11.

Although Plaintiffs do not dispute that some of Louisville's production was transferred to the Toledo plant, they contend that DOL made no independent effort to verify the scale of this transfer or whether it approached the size of the Louisville operation.<sup>13</sup> Plaintiffs' Brief at 12.

Plaintiffs also assert that DOL allegedly failed to investigate the veracity of statements of Johnson Controls' officials that no production was transferred from Louisville to Mexico. See Plaintiffs' Brief 14. Plaintiffs "impeachment" evidence consisted of documents showing that (1) battery production at Johnson Controls' Mexican facility had increased for original equipment and aftermarket customers; (2) volunteers from the Louisville plant were sought to train workers in Mexico; (3) equipment from other Johnson Control plants had been transferred to Mexico; and (4) Johnson Controls had planned to open a distribution center in San Antonio to distribute batteries produced in Mexico.<sup>14</sup> See Plaintiffs' Brief 12-14.

In addition, Plaintiffs assert that Johnson Controls officials had allegedly been less than forthcoming about their Mexican operations and

<sup>13</sup> Two hundred sixty four workers were separated from the Louisville plant. See Adjustment Assistance Investigation Log, AR 1.

<sup>14</sup> Plaintiffs also raise a statement made by Mike Johnston of Johnson Controls during a meeting with UAW that "batteries could return to the United States in vehicles or to the 'fill and form' operation in Texas." Plaintiffs' Brief at 13. See also Letter from Puckett to Trunzo dated Nov. 13, 1995, AR 18. It was appropriate for DOL to decline to investigate Plaintiffs' apparent allegations that batteries had been transferred from Louisville to Mexico and returned to the United States in new cars because batteries in new cars only indirectly compete with original equipment automotive batteries. Here, the necessary comparison is between "like or directly competitive" automotive batteries (*i.e.*, purchases of foreign manufactured original equipment batteries and the Louisville plant's production of such batteries). *Negative Determination on Reconsideration*, 61 Fed. Reg. at 6658; see 19 U.S.C. § 2272(a)(3) (1994); see also *Former Employees of Johnson Controls, Inc. v. United States*, 16 CIT 617, 618 (1992) (increases in imports of finished cars would not provide basis for trade adjustment assistance for workers who produced metal back and seat frame prototypes for automotive seating).



that accordingly DOL should have presumed that they were not truthful with respect to this transfer of production.<sup>15</sup> See Plaintiffs' Brief at 15.

Here, Johnson Controls' statement that "[n]o production was shifted to Mexico" from Louisville is not contradicted by Plaintiffs' evidence that battery production at the Johnson Controls' Mexican facility had increased for original equipment customers. See Johnson Controls Completed Supplemental Questionnaire, SCAR 5; Two Paragraphs from *After Market Business* dated Oct. 1, 1994, AR 33. The original equipment production might have been shifted to Mexico from a facility other than Louisville or resulted from new customer orders or increased efficiency.

Contrary to the allegations above discussed, the remaining evidence does not contradict statements made by Johnson Controls' officials. First, Plaintiffs' evidence that aftermarket production had increased at the Mexican plant, management requested volunteers to train Mexican workers, and equipment was transferred to Mexico, is in accord with, rather than in contradiction to, the statement by a company official that the Mexican facility was producing aftermarket batteries.<sup>16</sup> Johnson Controls Completed Supplemental Questionnaire, SCAR 5. In addition, such evidence only suggests that Johnson Controls had transferred some of its automotive battery production to Mexico. It does not establish that the transfer of production was from Louisville as opposed to the three other plants that were previously producing aftermarket batteries.

Second, Plaintiffs' evidence that the company planned to open a distribution center in San Antonio is also in accord with, rather than in contradiction to, company statements that such a facility existed and was in use. See Johnson Controls Completed Supplemental Questionnaire, SCAR 5.

Finally, although Plaintiffs' contend Johnson Controls' officials have a propensity to lie, there is no evidence in the record to suggest such a general propensity.<sup>17</sup> "As a general matter, evidence of a person's character or character trait is not admissible in a civil \* \* \* case to prove that the person acted in conformity with that character or character trait."

<sup>15</sup> Unverified statements from company officials in a position to know about their company's products and business decisions can be relied upon when there is no other evidence in the record to contradict or cast doubt upon those statements. See *Local 167 v. Marshall*, 643 F.2d 26, 31-32 (1st Cir. 1981) (Secretary did not abuse discretion by relying on unverified statements of company officials); *United Steel Workers of America, Local 1082 v. McLaughlin*, 15 CIT 121, 122-23 (1991) (Secretary could rely upon unverified evidence from manager who knew what was being produced at plant during period of investigation because statement was not contradicted by the record); *Former Employees of Bell Helicopter Textron v. United States*, 18 CIT 323, 326 (1994) (Unverified statements of company official's could not be relied upon because both officials that were interviewed "had serious adverse interests to acknowledging or confirming that the job losses were due to the fact that [the firm] could pay Canadians less than Americans \* \* \* [and] \* \* \* intended to do just that. The public relations implications alone were enough to cast a cloak of suspicion over [the] responses.")

<sup>16</sup> This information was consistent with DOL's finding that the previously-certified workers from Johnson Controls' other facilities were engaged in the production of aftermarket batteries. See *Notice of Negative Determination of Reconsideration On Remand*, 62 Fed. Reg. at 31,626.

<sup>17</sup> Contrary to Plaintiffs' arguments, there is no misstatement of fact about where the Louisville production was transferred domestically. In one response, the company informed DOL that the production had been transferred to Toledo, Ohio. Page of Johnson Controls Completed DOL Business Confidential Data Request Listing Major Declining Customers, CAR 12. In its second response, the company informed DOL that the "[p]roduction of automotive batteries sold to Gonher de Mexico from Louisville were transferred to Johnson Controls' St. Joseph, Missouri facility." Johnson Controls Completed Supplemental Questionnaire, SCAR 5. However, these statements were made approximately a year and a half apart and by different company officials.



2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 404.10 (2d ed. 1998). Therefore, the evidence in the record does not contradict or cast doubt upon the unverified statements of the Johnson Controls' officials, and DOL did not abuse its discretion by relying on the statements.

## V

## CONCLUSION

For the reasons set forth above, DOL's denial of certification is supported by substantial evidence and is in accordance with the trade adjustment assistance provisions of the Trade Act. Therefore, Plaintiffs' Motion for Judgment on the Agency Record is denied and DOL's *Negative Determination of Reconsideration On Remand* is affirmed.

---

(Slip Op. 98-122)

INTERNATIONAL LIGHT METALS, A DIVISION OF MARTIN MARIETTA  
TECHNOLOGIES, INC., PLAINTIFF v. UNITED STATES, DEFENDANT

Court No. 95-08-01037

Plaintiff moves for summary judgment pursuant to U.S. CIT R. 56, contending the United States Customs Service (Customs) improperly denied its protests challenging Customs' refusal to pay in their entirety plaintiff's claims for manufacturing substitution duty drawback. Plaintiff contends it is entitled to receive the full amount of drawback claimed because: (1) its manufacturing operations comply with the statutory and regulatory requirements necessary to receive manufacturing substitution duty drawback; (2) Customs, consistent with a long-standing administrative practice, approved drawback contracts and paid drawback claims made by manufacturers with production processes similar to those of the plaintiff; (3) plaintiff detrimentally relied upon Customs' approval of drawback contracts submitted by, and payment of drawback duties to, manufacturers with production processes similar to those of the plaintiff; and (4) plaintiff's drawback entries became liquidated by operation of law one year after their filing.

Defendant cross-moves for summary judgment contending Customs properly denied portions of plaintiff's duty drawback claims.

*Held:* Plaintiff's Motion for Summary Judgment is denied, and defendant's Cross-Motion for Summary Judgment is granted.

(Dated August 24, 1998)

Donald F. Beach, Falls Church, VA, for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Mikki Graves Walser); Mark G. Nackman, Office of the Assistant Chief Counsel for International Trade Litigation, United States Customs Service, of counsel, for defendant.

## OPINION

CARMAN, *Chief Judge*: Plaintiff moves for summary judgment pursuant to U.S. CIT R. 56, contending the United States Customs Service

(Customs) improperly denied its protests challenging Customs' refusal to pay in full plaintiff's claims for manufacturing substitution duty drawback. Plaintiff contends its manufacturing operations comply with the statutory and regulatory requirements necessary to receive manufacturing substitution duty drawback pursuant to 19 U.S.C. § 1313(b) (1988). Additionally, plaintiff asserts the partial denial of its drawback claims is contrary to Customs' long-standing administrative practice whereby it approved drawback contracts and paid drawback claims of manufacturers with production processes similar to those of the plaintiff. In a third argument, plaintiff contends this Court should invoke its equitable powers and find Customs is estopped from denying plaintiff's drawback claims because plaintiff detrimentally relied upon Customs' approval of drawback contracts submitted by, and payment of drawback duties to, manufacturers with production processes similar to those of the plaintiff. Finally, plaintiff contends Customs improperly denied its drawback claims because the drawback entries became liquidated by operation of law one year after their filing with Customs pursuant to 19 U.S.C. § 1504(a) (1988).

Defendant cross-moves for summary judgment contending Customs properly denied portions of plaintiff's application for duty drawback. Defendant challenges every argument advanced by plaintiff and asserts it is entitled to the entry of summary judgment in its favor.

This Court has jurisdiction to review Customs' denial of plaintiff's protest pursuant to 28 U.S.C. § 1581(a) (1988) and 19 U.S.C. § 1515(a) (1988) (establishing procedures for resolving protests of Customs' "refusal to pay a claim for drawback" filed pursuant to 19 U.S.C. § 1514(a)(6)).

#### BACKGROUND

International Light Metals, a Division of Martin Marietta Technologies, Incorporated (ILM), manufactures titanium alloy shapes such as bars, billets, pipes, tubes, angles, channels, and other structural forms. The alloys produced and utilized by ILM combine precise quantities of titanium with other alloying elements such as aluminum, vanadium, iron, copper, and carbon. The titanium utilized in the alloys is obtained from either: (1) titanium sponge, a virtually pure form of titanium;<sup>1</sup> or (2) titanium alloy scrap, consisting of turnings, chips, and solid pieces from prior production runs.

Depending on whether the alloy is produced utilizing only titanium sponge or with a combination of titanium sponge and titanium alloy scrap, alterations must be made in the manufacturing process. When the titanium is obtained from sponge, or titanium alloy scrap consisting of turnings or chips, the titanium-containing inputs are weighed and combined with an appropriate amount of alloying elements. The elements composing the alloy are then compressed into bricks which are

<sup>1</sup> Titanium sponge is a virtually pure form of titanium that is often used as melting stock in producing titanium alloys. ILM's approved drawback contract addressed its use of titanium sponge with a minimum titanium content of 99%. (See Pl.'s Ex. 6 at 5.)

welded automatically into an electrode. After the six-hour welding process is completed, the electrode is heated and formed into ingots which are further manufactured into various shapes. In contrast, because recycled solids cannot be compressed into bricks, titanium alloy produced with solid scrap requires a different welding process. Recycled solids are welded manually into an electrode, a process which requires approximately forty hours to complete. After the welding is completed, the electrode is melted in the same fashion as an electrode assembled from bricks of compressed titanium sponge, chips, or turnings and is formed into ingots which are further manufactured into the various shapes.

At issue in this matter is whether ILM is eligible to receive duty drawback on merchandise manufactured with titanium alloy scrap and subsequently exported from the United States.<sup>2</sup> Drawback is the refund of duties paid upon goods previously imported into the United States which are used in the manufacture or production of articles which subsequently are exported. See Kenneth Wolf, *Customs Law & Administration* § 17.1 (3<sup>rd</sup> ed. 1998); see also *Nicholas & Co. v. United States*, 7 Ct. Cust. Appls. 97, 110, T.D. 36426 (1916), *aff'd*, 249 U.S. 34, 39 S. Ct. 218, 63 L. Ed. 461 (1919). Customs' regulations define drawback as "a refund or remission, in whole or in part, of a customs duty, internal revenue tax, or fee lawfully assessed or collected because of a particular use made of the merchandise on which the duty, tax, or fee was assessed or collected." 19 C.F.R. § 191.2(a) (1994). While the statute provides several different circumstances in which companies may apply for and receive duty drawback, see 19 U.S.C. § 1313(a)-(l) (1988), ILM sought to receive manufacturing substitution duty drawback pursuant to 19 U.S.C. § 1313(b), which provides:

**(b) Substitution for drawback purposes**

If imported duty-paid merchandise and duty-free or domestic merchandise of the same kind and quality are used in the manufacture or production of articles within a period not to exceed three years from the receipt of such imported merchandise by the manufacturer or producer of such articles, there shall be allowed upon the exportation of any such articles, notwithstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported articles, an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported; \* \* \*.

19 U.S.C. § 1313(b) (1988).

A precondition to receiving duty drawback is the completion and approval of a drawback contract with Customs. See 19 C.F.R. § 191.21(a) ("[E]ach manufacturer or producer of articles intended for exportation with drawback, \* \* \* shall apply for a specific drawback contract by submitting a drawback proposal."). Not surprisingly, the regulations direct

<sup>2</sup>The parties agree merchandise manufactured solely with titanium sponge is eligible for drawback. Indeed, Customs has paid ILM's drawback claims on merchandise manufactured solely with titanium sponge. (See Def.'s Stmt. Of Mater. Facts at 2 (noting ILM was paid approximately \$200,000 for "the part of the [drawback] claims based on the use of titanium sponge, with the desired alloying materials added, without scrap").)

that drawback proposals which "comply with the law and regulations" shall be approved by Customs. 19 C.F.R. § 191.23(a) (1994).

With respect to the instant case, ILM submitted a proposed substitution manufacturing drawback contract to Customs on July 26, 1985. Following its review of ILM's proposal, Customs approved the proposed drawback contract on September 3, 1985. *See* T.D. 85-165-(N), 19 Cust. B. & Dec. 392 (1985). ILM's approved drawback contract provided for the substitution of "Titanium Sponge, with a minimum titanium content of 99%" for "Titanium Sponge, with a minimum titanium content of 99%." (Pl.'s Ex. 6 at 5.)

Between October 28, 1985 and November 12, 1987, ILM filed twenty-four drawback claims based on its approved drawback contract, Treasury Decision (T.D.) 85-165-(N). While these claims for duty drawback initially were paid by Customs under the accelerated drawback program, a drawback audit dated February 28, 1988, reported ILM had utilized titanium alloy scrap in its production process and thus failed to satisfy the terms of its approved drawback contract which provided for the substitution of titanium sponge for titanium sponge. Additionally, the audit observed that while ILM's substitution of titanium alloy scrap for titanium sponge "may be correctable by an amendment to the firm's drawback contract," it expressed concern that "the substituted materials may not be the same kind and quality as the designated material" and thus not in conformity with the requirements of 19 U.S.C. § 1313(b). (*See* Def.'s Ex. 3 at 1.) The audit requested further guidance in the form of an "internal advice" as to whether the titanium alloy scrap satisfied the statutory requirement that it be of the same kind and quality as titanium sponge.

In a letter dated July 9, 1990, Customs informed ILM of its determination that titanium alloy scrap was not merchandise of the same kind and quality as titanium sponge. (*See* Pl.'s Ex. 15A at 1 ("We have now received a ruling from [the Office of Regulations and Rulings] stating that, 'The inevitable conclusion is that an alloy scrap, sought to be substituted for *both* its primary metal and its alloying component(s), is not the same kind and quality as the imported pure metal.'").) As a result, Customs informed ILM that it would be entitled to receive drawback only with respect to those goods manufactured with titanium sponge because goods manufactured with titanium alloy scrap did not meet the same kind and quality requirement of 19 U.S.C. § 1313(b).

Following the issuance of the audit, but prior to Customs' determination that titanium sponge and titanium alloy scrap were not merchandise of the same kind and quality, ILM submitted a proposed revised drawback contract in a letter dated June 19, 1989. The proposed revised contract included language which listed not only titanium sponge as a substitute material, but also listed titanium alloy scrap as a substitute for imported, duty-paid titanium sponge. (*See* Pl.'s Ex. 7 at 2 (listing "[s]crap made with the use of Titanium sponge containing at least 99.3% pure Titanium" as a substitute for use in the production of ex-

ported merchandise).) In a letter dated October 10, 1991, following its review of ILM's proposal, Customs informed ILM that the inclusion of titanium alloy scrap as a substitute for titanium alloy sponge did not satisfy the same kind and quality requirement and rejected ILM's proposed revision to its drawback contract. On January 2, 1992, ILM requested that Customs review its rejection of ILM's proposed revised drawback contract. After conducting this review, in a letter dated July 17, 1992, Customs informed ILM that, consistent with its earlier determination, the proposed revised drawback contract failed to satisfy the statutory requirements for manufacturing substitution drawback.

Between March 12 and June 25, 1993, Customs liquidated the twenty-four entries at issue. The entries were liquidated such that ILM received drawback only on merchandise manufactured with titanium sponge and containing no titanium alloy scrap. ILM filed protests challenging Customs' denial of its claims for duty drawback on items manufactured with titanium alloy scrap on June 8 and August 18, 1993. Customs denied these protests on April 10, 1995, and plaintiff timely filed the present action in this Court challenging Customs' denial of its protests.

#### CONTENTIONS OF THE PARTIES

##### *A. Plaintiff*

Plaintiff raises four principal arguments in contending Customs improperly denied its protests challenging the determination it was only entitled to receive drawback on those items manufactured without titanium alloy scrap. First, plaintiff contends Customs wrongly rejected ILM's drawback claims because ILM's use of titanium alloy scrap in manufacturing titanium shapes satisfies the statutory and regulatory requirements established for manufacturing substitution drawback. Plaintiff asserts, "ILM is entitled to drawback because it has adhered to the letter and spirit of the substitution manufacturing law's requirements, particularly [the] same kind and quality [requirement] for imported and substituted merchandise as \*\*\* defined in Treasury Decision 82-36." (Pl.'s Mem. in Supp. of Mot. for Summ. J. (Pl.'s Br.) at 7.)

Second, ILM argues that in denying its protests Customs impermissibly departed from its long-established administrative practice of paying duty drawback to producers and manufacturers which used scrap in their production processes. Plaintiff places particular emphasis on T.D. 83-257-K, 17 Cust. B. & Dec. 686 (1983), T.D. 83-257-O, 17 Cust. B. & Dec. 687 (1983), and 83-257-T, 17 Cust. B. & Dec. 688 (1983), asserting Customs' approval of drawback contracts in these three decisions entitles ILM to drawback because ILM's "operations and materials used interchangeably in manufacture track exactly other claimants which were paid drawback on exported titanium alloy products." (Pl.'s Br. at 8.)

Third, ILM contends that it detrimentally relied on Customs' payment of drawback to other manufacturers who used scrap in their production processes and based on this reliance, contends it is entitled to

receive drawback. ILM asserts its belief that its use of titanium alloy scrap was similar if not identical to other manufacturers with approved drawback contracts "led it to the well supported belief that its contract would be approved." (*Id.*) As a result of this belief, ILM asserts it was entitled to notice of Customs' purported shift in interpreting T.D. 82-36 and argues Customs may only deny it drawback prospectively.

Finally, plaintiff asserts it is entitled to receive drawback on those articles manufactured with titanium alloy scrap because its drawback claims became liquidated by operation of law one year after the date of their filing. Plaintiff contends Customs' denial of drawback was inappropriate because the twenty-four drawback entries were liquidated by operation of law, pursuant to 19 U.S.C. § 1504(a), one year after the filing of the drawback entries.

#### B. Defendant

Defendant opposes plaintiff's motion for summary judgment and has filed a cross-motion for summary judgment pursuant to U.S. CIT R. 56. Defendant rebuts each contention raised by plaintiff and asserts it is entitled to judgment as a matter of law. Defendant argues ILM is not entitled to drawback because its operations failed to meet the requirements established by the statute as well as the relevant Customs regulations. With respect to the same kind and quality requirements established in 19 U.S.C. § 1313(b), defendant asserts the plaintiff concedes the titanium alloy at issue is not of the same kind and quality as the titanium sponge. (*See* Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. and in Supp. of Def.'s Cross-Mot. for Summ. J. (Def.'s Br.) at 17.)

Defendant also contends ILM failed to comply with the relevant regulations promulgated by the Customs Service. Specifically, defendant raises three arguments for the proposition that ILM's operations do not satisfy the requirements of the substitution manufacturing drawback as embodied in T.D. 82-36. First, defendant contends ILM's operations do not satisfy the requirement of T.D. 82-36 that "use of the different materials does not require significant change in the manufacturing process." (Def.'s Br. at 19 (quoting T.D. 82-36, 16 Cust. B. & Dec. 97, 98 (1982)).) Second, defendant contends T.D. 82-36 requires the isolation of a sought element in order to be eligible for drawback. Defendant argues ILM's use of titanium alloy scrap does not satisfy T.D. 82-36's requirement that "the sought element must be isolated in its pure form in the manufacturing process." (Def.'s Br. at 21-22.) Finally, defendant argues ILM's use of titanium alloy scrap doesn't satisfy T.D. 82-36 because ILM's operations sought to use *all* the elements in the titanium alloy, rather than just a single element as in T.D. 82-36.

The second principal argument raised by defendant asserts ILM is not entitled to manufacturing substitution drawback because no administrative practice exists which would entitle ILM to receive drawback based on its operations. Defendant challenges ILM's contention that three approved drawback contracts (T.D. 83-257-K, T.D. 83-257-O, and

T.D. 83-257-T) are sufficient to demonstrate the existence of a long-standing administrative practice.

Third, defendant asserts ILM is not entitled to drawback on the basis of estoppel or detrimental reliance. Defendant contends estoppel and detrimental reliance are equitable doctrines that do not operate against the government in cases in which the government is acting in its sovereign capacity. Defendant maintains because this case involves the collection or refund of customs duties on imports and the application and enforcement of Customs' regulations, plaintiff may not assert equitable principles against the government. Additionally, defendant argues plaintiff is not entitled to assert equitable principles against the government because plaintiff does not have clean hands due to its admitted breach of its approved drawback contract.

Finally, defendant challenges plaintiff's argument that the twenty-four drawback entries at issue were liquidated by operation of law pursuant to 19 U.S.C. § 1504(a) (1988). Defendant specifically notes a relevant regulation which provides the provisions of 19 U.S.C. § 1504(a) "shall not apply to \* \* \* drawback entries." 19 C.F.R. § 159.11(b) (1986). Additionally, defendant points to subsequent legislative history that specifically states, "there is no statutory time limitation for the liquidation of drawback claims." (Def.'s Br. at 42 (citing H.R. Rept. 103-361, at 132 (1993), *reprinted in* 1993 U.S.C.A.N. 2552, 2682).)

#### STANDARD OF REVIEW

This case is before the Court on cross-motions for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." U.S. CIT R. 56(d). "The Court will deny summary judgment if the parties present a dispute about a fact such that a reasonable trier of fact could return a verdict against the movant." *Ugg Int'l, Inc. v. United States*, 17 CIT 79, 83, 813 F. Supp. 848, 852 (1993) (quotation and citation omitted). When appropriate, summary judgment is a favored procedural device to "secure the just, speedy, and inexpensive determination" of an action. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed.2d 265 (1986)) (internal quotations omitted). The parties agree, and this Court finds, there are no genuine issues as to any material facts in this matter. Accordingly, the Court may properly resolve this matter by summary judgment.

#### DISCUSSION

##### 1. *ILM's Entitlement to Drawback Based on Compliance with the Applicable Statutory and Regulatory Requirements*

Plaintiff first contends it is entitled to receive manufacturing substitution duty drawback because "ILM's operations and materials used fall within the letter and spirit" of the applicable statutory and regulato-



ry requirements. (Pl.'s Br. at 20 (emphasis omitted).) Specifically, ILM contends its operations comply with the requirements of T.D. 82-36, which establishes parameters on materials which when used in stoichiometric substitution satisfy the "same kind and quality" requirement of 19 U.S.C. § 1313(b). Defendant challenges this assertion and contends plaintiff's operations do not satisfy either the statutory or regulatory requirements for substitution manufacturing drawback.

Initially, the Court notes that neither the statute nor Customs' regulations provide any helpful guidance on the meaning of "same kind and quality" in 19 U.S.C. § 1313(b). The statute contains no definition of the term, and the definition provided by the regulations is unhelpful. See 19 C.F.R. § 191.2(m) (1989) ("Same kind and quality merchandise" means merchandise which may be substituted under substitution drawback."). While the statute and regulations provide little, if any, guidance as to the meaning of the statutory term "same kind and quality", Customs has addressed materials it will consider to satisfy the statutory requirement of "same kind and quality" in a published ruling. See T.D. 82-36, 16 Cust. B. & Dec. 97 (1982).

The introductory sentence of T.D. 82-36 states, "[u]nder the drawback law (19 U.S.C. 1313(b)) drawback contracts have been approved since 1958, permitting the substitution of one domestic compound for a different imported compound when an *identical element* is sought for use in manufacturing an exported article." 16 Cust. B. & Dec. at 97 (emphasis added). T.D. 82-36 goes on to note, "substitution is allowed of primary source materials to obtain a *sought element* \* \* \*, if use of the different materials does not require significant change in the manufacturing process." *Id.* at 98 (emphasis added). The Court finds these two excerpts clearly express Customs' determination that scrap materials used in a stoichiometric substitution manufacturing process satisfy the statute's same kind and quality requirement only where a single "sought element" contained in the scrap appears in the finished product.<sup>3</sup>

Plaintiff contends ILM's operations meet the requirements of T.D. 82-36 concerning stoichiometric substitution and thus satisfy the statute's same kind and quality requirement. In support of this argument, plaintiff makes two assertions. First, plaintiff contends T.D. 82-36 should be interpreted to authorize drawback where scrap is used "as a source material which can be used to obtain a single sought element upon which drawback is based." (Pl.'s Br. at 7.) Second, plaintiff argues because the titanium contained in titanium sponge is identical to the titanium contained in alloy scrap, substitution of alloy scrap for sponge satisfies the statute's same kind and quality requirement. Plaintiff characterizes ILM's operations as "substitut[ing] the titanium in the

<sup>3</sup> Defendant also maintains T.D. 82-36 requires the sought element "must be isolated in its pure form in the manufacturing process." (Def.'s Br. at 21-22.) While T.D. 82-36 clearly discusses a hypothetical fact pattern involving the substitution of cuprite for chalcocite as a source of copper, the Court can find no language in T.D. 82-36 requiring isolation of the sought element in its pure form during the manufacturing process.



sponge for the *titanium* in the scrap for drawback." (*Id.* at 20 (emphasis omitted).)

Because the Court finds ILM's utilization of titanium alloy scrap in its manufacturing process does not comply with T.D. 82-36's requirement that only a single "sought element" be extracted from the scrap, plaintiff's first argument is rejected. ILM's utilization of titanium alloy scrap in its manufacturing process results in more than a single "sought element" appearing in the finished product. Not only is titanium sought, but as plaintiff notes, "other alloying elements [contained in the titanium alloy scrap] appear in the finished shapes." (Pl.'s Br. at 45.) This is inconsistent with T.D. 82-36's clear statement that only stoichiometric substitutions which result in a single sought element appearing in the finished product satisfy the statute's same kind and quality requirement. The Court is not persuaded by plaintiff's contention that it should interpret the term "sought element" in T.D. 82-36 to mean a "sought element upon which drawback is based." T.D. 82-36 makes no such distinction, and the Court finds no basis in the clear language of T.D. 82-36 for the interpretation asserted by ILM.<sup>4</sup>

Additionally, the Court rejects plaintiff's second argument that ILM's utilization of titanium alloy scrap satisfies the requirements of T.D. 82-36 because titanium obtained from the alloy scrap is of the same kind and quality as titanium obtained from sponge. The Court rejects this argument for much the same reason expressed in the previous paragraph. While plaintiff is undoubtedly correct that the titanium contained in the two different source materials (sponge and scrap) is identical, plaintiff's argument fails to account for the fact that ILM's utilization of titanium alloy scrap results in more than a single "sought element" appearing in the final product. As noted above, other elements such as aluminum, vanadium, iron, oxygen, copper, and carbon appear both in the titanium alloy scrap as well as in the finished product gainsaying T.D. 82-36's requirement that only a "sought element" obtained by stoichiometric substitution will satisfy the statute's same kind and quality requirement.

Finally, the Court rejects plaintiff's contention that it has a vested right to drawback. The case law clearly establishes an applicant's ability to receive drawback is conditioned upon compliance with the relevant statutory and regulatory requirements. *See Romar Trading Co., Inc. v. United States*, 27 Cust. Ct. 34, 37, C.D. 1344 (1951) ("The right to recover drawback \* \* \* arises only when all of the provisions of the statute and the applicable and lawful regulations prescribed under its authority have been complied with."). Prior to the claimants exporting the goods in compliance with the applicable statutory and regulatory requirements, the claimant has only an "inchoate right, or a 'right accruing'" which may become an absolute right. *General Motors Corp. v. United*

<sup>4</sup> Additionally, the Court notes ILM's use of titanium alloy solids requires alterations to the manufacturing process which are contrary to T.D. 82-36's requirement that the use of scrap may not "require [a] significant change in the manufacturing process." T.D. 82-36, 16 Cust. B. & Dec. 97, 98 (1982). As noted in Customs' 1988 Audit Report on ILM's operations, solid pieces of titanium alloy "bypass one step entirely (compression) and perform a different kind of another process (welding) which takes a longer period of time to complete." (Pl.'s Ex. 3 at 6.)

*States*, 32 Cust. Ct. 94, 97, C.D. 1587 (1954); *cf. Romar Trading*, 27 Cust. Ct. at 37 ("Until the privilege has been ripened into a right to recover, it may be regulated or even so circumscribed by the Congress as to be impossible of utilization \* \* \*"). Because plaintiff never obtained an approved drawback contract permitting the substitution of titanium alloy scrap for titanium sponge and because its manufacturing operations did not satisfy the requirements of T.D. 82-36, contrary to its assertion, ILM never obtained a vested right to drawback.

## 2. *Existence of an Administrative Practice Regarding Same Kind and Quality Merchandise*

In the alternative, plaintiff argues if this Court finds ILM's operations do not satisfy the statutory and regulatory requirements for manufacturing substitution drawback, this Court should nevertheless find Customs had an administrative practice of paying drawback to claimants with manufacturing operations utilizing titanium alloy scrap in a manner similar or identical to ILM. Plaintiff claims an "entitlement [to drawback] \* \* \* from Customs long established administrative practice/position of paying drawback on sought metals obtained from scrap." (Pl.'s Br. at 36 (citing T.D. 83-257-K, 17 Cust. B. & Dec. 686 (1983); T.D. 83-257-O, 17 Cust. B. & Dec. 687 (1983); T.D. 83-257-T, 17 Cust. B. & Dec. 688 (1983); T.D. 91-45-I, 25 Cust. B. & Dec. 101 (1991)).) Defendant responds by asserting the abstracted drawback contracts cited by the plaintiff "are insufficient to show a long standing administrative practice." (Def.'s Br. at 31.) Defendant maintains plaintiff's citation of the published abstracted drawback contracts at most establishes the contracts were approved, but asserts the approval is of little relevance because "Customs still required that the claims be consistent and in compliance with the applicable statutes, regulations and the terms of the individual contracts." (*Id.* at 32.)

Plaintiff relies on the decisions in *United States v. International Paint Co., Inc.*, 35 C.C.P.A. 87, C.A.D. 376 (1948), *Joshua Hoyle & Sons, Ltd. v. United States*, 25 C.C.P.A. 128, T.D. 49244 (1937), and *John J. Coates v. United States*, 3 Cust. Ct. 193, C.D. 232 (1939), in contending Customs should not be able to deviate from what plaintiff asserts is its long-standing administrative practice of paying drawback to manufacturers which utilize titanium alloy scrap in their production processes. While plaintiff is correct that opinions issued by the predecessors of this Court and the Court of Appeals for the Federal Circuit addressed the extent to which Customs may be bound by its long-standing administrative practices, plaintiff's brief does not provide any discussion or analysis of more recent opinions which build upon and expand the earlier analysis of Customs' long-standing administrative practices.

An analysis of the more recent opinions discloses two significant principles useful in evaluating ILM's argument. First, a line of cases addresses actions, which when taken by Customs, provide the basis for finding the existence of an administrative practice, as well as those actions which are not sufficient to establish a binding precedent. In *Bor-*

*neo Sumatra Trading Co., Inc. v. United States*, 56 Cust. Ct. 166, C.D. 2624 (1966), the Customs Court determined abstracted classification rulings published in the Treasury Decisions were not "decisions" which bound the government. The Court noted, "it is clear that an abstract of a decision is not a decision" and that "[t]o take an abstract for a decision is like taking a headnote for a court opinion." *Id.* at 173 (footnote omitted). The Court emphasized the existence of a regulation that provided classification rulings were binding only upon the "publication of a decision, not by an abstract" in concluding an abstracted classification ruling was not binding on the government. *Id.* at 174. With respect to the instant matter, ILM relies on abstracts of drawback contracts published in the Customs Bulletin in 1983 and 1991. An application of the *Borneo Sumatra Trading Company* decision to the matter before the Court undercuts plaintiff's assertions that abstracts of drawback contracts published in the Customs Bulletin result in a binding, long-standing administrative practice of the Customs Service.

This conclusion is bolstered by the decision in *Ditbro Pearl Co., Inc. v. United States*, 62 C.C.P.A. 95, 96, 515 F.2d 1157 (1975), in which the United States Court of Customs and Patent Appeals determined an abstracted Customs Service decision relied on by the appellant was not a "published decision" which established a binding uniform administrative practice. The Court determined abstracted classification rulings published in the Customs Bulletin "are published as a matter of information and guidance and not for the purpose of establishing a[n] [administrative] practice." *Id.* (internal quotation omitted). Thus, this Court rejects plaintiff's contention the publication of abstracted drawback contracts in T.D. 83-257-K, T.D. 83-257-O, T.D. 83-257-T, and T.D. 91-45-I creates a binding administrative practice on Customs.

Second, a more recent case illuminates the circumstances under which a court may find Customs bound to an administrative practice which is not the result of a published finding by the Secretary of the Treasury. In *Heraeus-Amersil, Inc. v. United States*, 9 CIT 412, 417-18, 617 F. Supp. 89, 94-95 (1985), *aff'd*, 4 Fed. Cir. (T) 95, 795 F.2d 1575 (1986), this Court determined even where a *de facto* uniform and established administrative practice existed in the absence of a published ruling, Customs could abandon such a practice without publishing notice of its intention to change its practice, so long as importers operating under that practice had notice of the change. With respect to ILM, its amended drawback contract submitted in 1989 proposing to substitute titanium alloy scrap for titanium sponge was never approved by Customs. Thus, even if the Court were to find Customs, without the existence of a published decision, did have a long-standing administrative practice of paying drawback to manufacturers utilizing titanium alloy scrap in their production processes, Customs would be entitled to change its practice without notification to ILM because ILM had not previously been operating under an approved contract providing drawback where titanium alloy scrap was substituted for titanium sponge. In any event, the Court

finds plaintiff has failed to prove Customs had such a uniform and established administrative practice of paying drawback to manufacturers utilizing titanium alloy scrap in a manner which did not meet the requirements of T.D. 82-36.

### 3. *ILM's Entitlement to Drawback Based on Detrimental Reliance*

Plaintiff's penultimate argument requests this Court exercise its equitable powers and find ILM entitled to receive drawback on the articles it manufactured with titanium alloy scrap based on its detrimental reliance on Customs' approval of drawback contracts submitted by third-party manufacturers which utilized titanium alloy scrap in their production processes. In support of this request, plaintiff points to the provisions codified in 19 C.F.R. 177.9(e)(2) (1991).<sup>5</sup> That regulation provides parties affected by modification of a Customs' ruling letter may obtain a delay in the effective date of the change if they can establish "the treatment previously accorded by Customs to the substantially identical transactions was sufficiently consistent and continuous that such party reasonably relied thereon in arranging for future transactions." 19 C.F.R. 177.9(e)(2) (1991). Defendant argues this Court should reject plaintiff's detrimental reliance claim and asserts equitable remedies may be awarded against the government only in circumstances where the government is not acting in its sovereign capacity. Defendant claims the collection of tariffs and revenues is a sovereign function, and therefore equitable remedies are not available to the plaintiff in this matter.

Plaintiff frames its argument in terms of "detrimental reliance", which traditionally requires an offer of unilateral contract. *See* Black's Law Dictionary 451 (6<sup>th</sup> ed. 1990) (defining detrimental reliance as a "[r]esponse by promisee by way of act to offer of promisor in a unilateral contract"). Plaintiff's papers do not contend Customs directly gave it reason to believe its amended drawback contract, which proposed the substitution of titanium alloy scrap for titanium sponge, would ever be approved. Rather, plaintiff's papers suggest ILM inferred Customs' approval of its proposed amended drawback contract based on Customs' approval of drawback contracts submitted by third-parties, which plaintiff alleges involved manufacturing operations utilizing titanium alloy scrap in a manner similar to ILM. Plaintiff asserts, "[t]he record is replete with ILM's claims that others were accorded the treatment sought by it for more than two years prior to Customs [sic] first refusal to approve ILM's replacement contract." (Pl.'s Br. at 46.)

The Court finds the record contains no evidence Customs ever suggested ILM would be able to receive drawback on items manufactured

<sup>5</sup> Plaintiff's brief also relies on 19 U.S.C. § 1625(c)(2) (1994) (requiring Customs to provide notice and opportunity to comment on determinations which "have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions"). This provision was enacted into law as part of the North American Free Trade Agreement Implementation Act of 1993, Pub. L. No. 103-182, § 623, 107 Stat. 2057, 2186 (1993). Because this provision was added to the statute after the events in issue occurred, the Court will disregard this aspect of plaintiff's argument. Additionally, the Court notes the statutory provision in effect prior to 1993 provides little, if any, assistance to plaintiff's arguments. *See* 19 U.S.C. § 1625 (1988) (providing "precedential decision[s] (including any ruling letter, internal advice memorandum, or protest review decision)" issued by the Customs Service shall be published in the Customs Bulletin or made available to the public).

with titanium alloy scrap and concludes there was no offer upon which plaintiff possibly could have detrimentally relied. Indeed, the Court finds plaintiff's use of the term "detrimental reliance" imprecise and interprets many of the plaintiff's arguments to be akin to its assertions concerning the existence of a long-standing administrative practice.

Additionally, the Court notes the regulations specifically foreclose ILM's reliance on Customs' approval of third-party drawback contracts which may have permitted the substitution of titanium alloy scrap for titanium sponge for drawback purposes. See 19 C.F.R. 177.9(c) (1991) ("[N]o other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.").

Finally, the Court of Appeals for the Federal Circuit addressed the binding effect of a ruling letter issued to a third-party in *Superior Wire v. United States*, 7 Fed. Cir. (T) 43, 867 F.2d 1409 (1989). In that decision, the Court determined a ruling letter issued to a third-party cannot be relied upon as a binding agency practice or finding. See *Superior Wire*, 7 Fed. Cir. (T) at 47, 867 F.2d at 1413. Because plaintiff never had reason to believe it would be entitled to substitute scrap and because the regulations preclude reliance on Customs ruling letters issued to third-parties, the Court rejects plaintiff's detrimental reliance claim.

#### 4. ILM's Entitlement to Drawback Based on Liquidation by Operation of Law

Finally, plaintiff argues the twenty-four entries at issue became liquidated by operation of law, pursuant to 19 U.S.C. § 1504(a),<sup>6</sup> one year after ILM filed its drawback entries. Plaintiff challenges Customs' promulgation of the regulation embodied in 19 C.F.R. § 159.11(b), which provides the deemed liquidation provisions of 19 U.S.C. § 1504(a) do not apply to drawback entries, contending Customs' regulation is contrary to Congress' expressed intent of "increas[ing] certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a Customs transaction." (Pl.'s Br. at 52 (quoting S. Rep. No. 95-778, at 32 (1978), reprinted in 1978 U.S.C.A.N. 2211, 2243).) Plaintiff also contends the omission of drawback entries from coverage in 19 U.S.C. § 1504(a) was a result of Congressional drafting error, and urges this Court to find § 1504(a) applicable to drawback entries. Defendant responds by asserting Customs' properly promulgated its regulation that specifically provides the deemed liquidation provision in 19 U.S.C. § 1504(a) does not apply to drawback entries and Customs' policy of not applying the limitations ex-

<sup>6</sup> The statute, in relevant part, provides:

(a) **Liquidation**

[A]n entry of merchandise not liquidated within one year from:

(1) the date of entry of such merchandise;

shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record. \*\*\*

19 U.S.C. § 1504(a) (1988).

pressed in § 1504(a) to drawback entries is a long-established administrative practice that Congress did not alter or eliminate when it approved the Customs Modernization Act of 1993.

Initially, the Court notes the statute specifically grants the Secretary of the Treasury broad authority to implement regulations relating to the payment of drawback. See 19 U.S.C. § 1313(l) (1988) ("Allowance of the privileges provided for in this section shall be subject to compliance with such rules and regulations as the Secretary of the Treasury shall prescribe, \* \* \* [including] the fixing of a time limit within which drawback entries or entries for refund \* \* \* shall be filed and completed. \* \* \*"). Plaintiff's challenge is directed at Customs' interpretation of the statute contained in a regulation promulgated in 1978. See *Proposed Rule: Entry of Merchandise and Liquidation of Entries*, 43 Fed. Reg. 55,774, 55,780 (Dep't Treas. 1978); T.D. 79-221,<sup>7</sup> 13 Cust. B. & Dec. 642, 650, 692, 739 (1979) (codified in relevant part at 19 C.F.R. § 159.11). In that regulation, Customs took the position that the deemed liquidation provision in 19 U.S.C. § 1504(a) "do[es] not include \* \* \* drawback entries." 43 Fed. Reg. at 55,780. See also T.D. 79-221, 13 Cust. B. & Dec. at 650 (same).<sup>8</sup>

The Court finds the statutory language does not express clearly whether the deemed liquidation provision codified at 19 U.S.C. § 1504(a) applies with respect to drawback entries. The statutory language does, however, suggest it applies only to imports. Specifically, the statute's reference to a single "entry of merchandise" appears to refer to entries of goods which remain in the United States, rather than drawback entries which are imported and subsequently exported from the United States. The legislative history offers little guidance on the scope of the statute's applicability, simply stating 19 U.S.C. § 1504(a) applies with respect to "entr[ies]," "importation[s]," and "importer[s]." S. Rep. No. 95-778, at 4, 31-32 (1978); H.R. Conf. Rep. No. 95-1517, at 16 (1978), *reprinted* in 1978 U.S.C.C.A.N. 2211, 2215, 2242-43, 2258. While these terms might arguably relate to drawback claims, the Court believes a better reading would exclude drawback entries from the scope of 19 U.S.C. § 1504(a). The central focus of drawback occurs when merchandise containing eligible inputs is exported, and it is not until the goods are exported that a claimant becomes eligible to receive draw-

<sup>7</sup>In promulgating the regulations concerning the applicability of § 1504, Customs relied on the authority of the Secretary of the Treasury to promulgate necessary rules pursuant to 19 U.S.C. §§ 66, 1624. See *Proposed Rule: Entry of Merchandise and Liquidation of Entries*, 43 Fed. Reg. 55,774, 55,781 (Dep't Treas. 1978). Those sections of the statute provide the Secretary of the Treasury with the authority to "prescribe \* \* \* rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, \* \* \* and shall give such directions to customs officers and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law", and to "make such rules and regulations as may be necessary to carry out the provisions of this chapter." 19 U.S.C. §§ 66, 1624. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *CPC International, Inc. v. United States*, 933 F. Supp. 1093, 1102 (CIT 1996) (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208, 109 S. Ct. 468, 471, 102 L. Ed.2d 493 (1988)).

<sup>8</sup>The regulation, as codified, in its entirety provides:

(b) *Applicability.* The provisions of this section and § 159.12 shall apply to entries of merchandise for consumption or withdrawals of merchandise for consumption made on or after April 1, 1979, but shall not apply to vessel repair entries or drawback entries.

19 C.F.R. § 159.11(b) (1991).

back. As plaintiff observes, "the amount of drawback depends on the amount of duty paid on imported merchandise that is used or not used in this country and then exported or destroyed." (Pl.'s Br. at 51.)

Given the ambiguity of the statute and the broad grant of authority provided to the Secretary of the Treasury pursuant to 19 U.S.C. § 1313(l), the Court finds Customs' promulgation of 19 C.F.R. 159.11(b), determining that § 1504(a) is not applicable to drawback entries, is reasonable. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L. Ed.2d 694 (1984) (reviewing court determines reasonableness of agency's statutory interpretation where statute is ambiguous). The Court's conclusion is bolstered by the fact that 19 C.F.R. 159.11(b) reflects a long-standing administrative practice of the Customs Service that has not been altered by Congress. See, e.g., *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457, 98 S. Ct. 2441, 2448-49, 57 L. Ed.2d 337 (1978).

Finally, plaintiff contends "[t]he failure to refer in section 1504 to other entries, which involve entries of merchandise directly, but are not consumption entries, should be attributed to drafting error in the legislative process." (Pl.'s Br. at 55.) Had Congress explicitly intended the deemed liquidation provisions of 19 U.S.C. § 1504(a) to apply to drawback entries, it would have included the appropriate language. The Court rejects plaintiff's drafting error argument, finding there is no suggestion of any intention to include drawback entries within the scope of § 1504(a).

#### CONCLUSION

For the reasons stated above, the Court finds Customs properly denied, in part, plaintiff's claims for manufacturing substitution duty drawback. Plaintiff's motion for summary judgment is denied, and the defendant's cross-motion for summary judgment is granted.



(Slip Op. 98-123)

SEA-LAND SERVICE, INC. AND AMERICAN PRESIDENT LINES, LTD.,  
PLAINTIFFS v. UNITED STATES, DEFENDANT

Consolidated Court No. 96-02-00398

(Dated August 25, 1998)

### ORDER

TSOUICALAS, *Senior Judge*: Upon consideration of plaintiffs' joint response to this Court's Order to Show Cause Why This Action Should Not Be Dismissed For Lack of Prosecution, and the plaintiffs, Sea-Land Service, Inc. and American President Lines, Ltd., having shown just cause against dismissal, it is

ORDERED that the case is once again placed on the Court's calendar, and it is further

ORDERED that the Clerk of the Court accept and file plaintiffs' joint Motion for Summary Judgment, and it is further

ORDERED that defendant has thirty (30) days from service of this Order to respond to the plaintiffs' Motion for Summary Judgment, and it is further

ORDERED that plaintiffs have ten (10) days after service of defendant's response to serve their reply, if any.

---

(Slip Op. 98-124)

U.S. VINADIUM CORP, ET AL., PLAINTIFFS v. UNITED STATES, DEFENDANT

Court No. 98-05-01726

(Dated August 25, 1998)

### ORDER

RESTANI, *Judge*: The stay applicable to this action is lifted solely for the purpose of deciding plaintiffs' motion for certification of a class of claimants seeking refund of Harbor Maintenance Taxes which were imposed in violation of the Constitution of the United States.

Plaintiffs' motion for class certification is denied for the reasons set forth in *Baxter Healthcare Corp. v. United States*, 925 F. Supp. 794 (CIT, 1996).



(Slip Op. 98-125)

UNITED STATES OF AMERICA, PLAINTIFF *v.* DAVID ISLIP, GERALD BROWN, STREAMFLO STRAINERS, INC., GREAT LAKES CUSTOMHOUSE BROKERAGE, INC., WASHINGTON INTERNATIONAL INSURANCE CO., AND INTERNATIONAL CARGO AND SURETY INSURANCE CO., DEFENDANTS

Court No. 97-02-00357

[Defendant's Motion to Quash Service of Process and Dismiss for Lack of Personal Jurisdiction, Failure to Plead Fraud with Particularity, and Failure to State Claims under 19 U.S.C. § 1592 is denied, and Defendant's Motion to Dismiss Time-barred Claims is granted.]

(Decided August 26, 1998)

*Frank W. Hunger*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *A. David Lafer*, Assistant Director; *John J. Hoffman*, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, for Plaintiff.

*Joel Daniels* for Defendants David Islip and Streamflo Strainers, Inc.

*Sidney N. Weiss*, (*Al J. Daniel, Jr.*), for Defendant Gerald Brown.

*Fitch, King & Caffentzis*, (*James Caffentzis*), for Defendant Great Lakes Customhouse Brokerage, Inc.

*Sandler, Travis & Rosenberg, P.A.*, (*Kenneth N. Wolf*), for Defendant Washington International Insurance Company.

*Hodes & Pilon*, (*Wayne Jarvis*), for Defendant International Cargo and Surety Insurance Company.

## OPINION

## I

## SUMMARY

WALLACH, *Judge*: The United States Customs Service ("Customs") commenced this action on February 28, 1997, against Gerald Brown ("Brown") and others to recover civil penalties for violation of section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1988), alleging fraudulent, grossly negligent, and negligent conduct concerning exportation of strainers, pump connectors, and check valves from Canada into the United States. This matter is before the Court on Defendant Brown's Motion to Quash Service of Process and Dismiss for Lack of Personal Jurisdiction, Failure to Plead Fraud with Particularity, Failure to State Claims under 19 U.S.C. § 1592, and to Dismiss Time-barred Claims ("Motion to Dismiss" or "Motion"). The other defendant's have not joined in his Motion. This Court has jurisdiction pursuant to 28 U.S.C. § 1582 (1994).

Brown's Motion is based on allegations that (1) personal service upon him of a Summons and Complaint by Customs Canada agents did not comply with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention" or "Convention"), and that the Proof of Service filed with the Court is not legally adequate; (2) he did not have "mini-

num contacts" with the United States sufficient to allow this Court to exercise personal jurisdiction over him; (3) the Government's Complaint did not plead fraud with particularity, as required by USCIT Rule 9(b); (4) he was not given sufficient time to respond to a prepenalty notice; and (5) the statute of limitations bars the Government's Complaint on those claims based on gross or simple negligence which accrued more than five years prior to his first waiver of the limitations period.

For the reasons that follow, the Motion is denied as to Defendant's first four arguments, and is granted as to the fifth.

First, Defendant waived his defense of insufficiency of service of process by not including it in his first responsive pleading. Moreover, had the defense not been waived, service would still be upheld because it complied with Articles 10(b) and 10(c) of the Hague Service Convention and because the two declarations of service filed with the Court satisfactorily demonstrate that the Summons and Complaint were delivered to Defendant. They also comply with the requirements of 28 U.S.C. § 1746 for declarations in lieu of affidavits executed abroad.

Second, this Court may exercise personal jurisdiction over Defendant because the acts which he is alleged to have committed constitute "purposeful," "minimum contacts" with the United States, and the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice."

Third, the Government's Complaint pleads fraud with sufficient particularity under CIT Rule 9(b). The Complaint specified the "time, place, and contents" of the alleged false representations.

Fourth, Defendant was, pursuant to 19 C.F.R. § 162.78(a), entitled to receive thirty, rather than seven, days to respond to his prepenalty notice. That shortened response time, however, did not deprive Defendant of due process at the administrative level. No harm accordingly, in this situation, means no foul.

Defendant is correct in his statute of limitations argument. The Government's claims that are based upon grossly negligent or negligent acts which occurred more than five years before Defendant signed his first waiver of the statute of limitations are time-barred. Defendant signed a waiver of the statute of limitations on August 10, 1993, which expressly excluded any claims that were already barred at the time the waiver became effective. Since, under 19 U.S.C. § 1621, the limitations period for grossly negligent and negligent violations of 19 U.S.C. § 1592 is five years, the Government's claims that are based upon grossly negligent or negligent acts which occurred more than five years before August 10, 1993, are time-barred.

## II

### STANDARD FOR DETERMINATION

In the context of a motion to dismiss, the Court assumes that "all well-pled factual allegations are true," construing "all reasonable inferences in favor of the nonmovant." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed.Cir. 1991). See also *United States v. Kab Trade Co.*, No.

96-06-01635, 1997 WL 155397 (CIT) (motion to dismiss based on lack of personal jurisdiction, lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted); *United States v. Jac Natori Co.*, 17 CIT 348, 821 F. Supp. 1514 (1993) (motion to dismiss alleging, *inter alia*, failure to plead fraud with particularity and failure to comply with the statute of limitations). Thus, "to the extent that factual questions are raised and are material to the result, dismissal is improper unless there is no reasonable view of the facts which could support the claim." *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1161 (Fed.Cir. 1993).

To determine the sufficiency of a motion to dismiss for failure to state a claim upon which relief can be granted (USCIT R. 12(b)(5)), consideration is limited to the facts stated on the face of the complaint, documents appended to the complaint and documents incorporated in the complaint by reference. *Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). In contrast, when other defenses are asserted under USCIT R. 12(b) (as under the corresponding Federal Rules), the Court may review evidence extrinsic to the pleadings. 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1364, at 468-69 (2d ed. 1990). See, e.g., *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) ("when a question of the District Court's jurisdiction is raised \* \* \* the court may inquire by affidavits or otherwise, into the facts as they exist."); *Marsden v. Federal B.O.P.*, 856 F. Supp. 832, 835 (S.D.N.Y. 1994) ("On a motion to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, or insufficiency of service of process, consideration of matters outside the pleadings is permissible.")

Under these standards, the facts of this case are the following:

### III

#### PERTINENT FACTS

As alleged in the Government's Complaint of February 28, 1997, Streamflo Strainers, Inc. ("Streamflo") is, and at all times relevant to this action was, a Canadian corporation located in Ontario, Canada. Compl. at ¶5. Brown was at all times relevant to this action General Manager of Streamflo and a resident of Canada. Compl. at ¶4. Customs alleges that on or about October 30, 1992, it discovered that Streamflo had submitted false statements and documents at the port of Buffalo, in violation of 19 U.S.C. § 1592. Compl. at ¶23, ¶24.

On March 15, 1993, Customs issued a pre-penalty notice to Brown, stating that Brown had ordered his employees to falsely mark merchandise in Canada prior to importation into the United States; that he ordered employees to remove country of origin markings from merchandise which had already entered into the United States; and that he ordered employees to make false statements on entry documents regarding the country of origin and material of composition of merchandise imported into the United States. Defendant's Exhibit 2. The notice indicated a tentative culpability level of fraud, with a corresponding penalty of \$6,674,462.50. *Id.*

The prepenalty notice stated that Brown had seven days from the date of the mailing of the notice to make a written and/or oral presentation as to why a claim for monetary penalty in the amount proposed should not be issued. *Id.* On March 19, 1993, Defendant mailed a written response to the prepenalty notice to Customs. Plaintiff's Exhibit I.

An amended penalty notice was issued to Defendant on April 5, 1993, assessing a penalty in the amount of \$5,627,346.86. *See* Compl. at ¶ 25.<sup>1</sup> Brown sent a petition and amended petition seeking mitigation of the penalty to Customs on April 15, 1993; April 21, 1993; and July 13, 1993. *See* Plaintiff's Exhibit J.<sup>2</sup>

On July 26, 1993, Customs responded to Brown's petitions for mitigation.<sup>3</sup> Brown was told that he could file a supplemental petition.<sup>4</sup>

Brown signed a waiver of the statute of limitations on August 6, 1993, to be effective through August 10, 1995. Defendant's Exhibit 3. On August 9, 1993, Brown requested a sixty day extension to file a supplemental petition protesting the proposed penalty. Plaintiff's Exhibit K. On August 13, 1993, Customs granted Brown's request, extending his supplemental petitioning period until October 11, 1993. Plaintiff's Exhibit L.

On October 6, 1993, Customs extended Brown's time to submit a supplemental petition to March 10, 1995 or to 30 days following resolution of the criminal proceedings in which Defendant was involved. Plaintiff's Exhibit M.

Customs sent Brown a notice on May 5, 1995, advising him that if he did not sign another waiver of the statute of limitations, his case would be referred to the Department of Justice for litigation. Plaintiff's Exhibit N. On July 28, 1995, Brown executed a waiver made for the period of two years commencing from August 10, 1995, and extending through August 10, 1997. Defendant's Exhibit 3. Customs accepted the waiver on August 4, 1995. *Id.*

On February 28, 1997, Plaintiff initiated its action against Brown.

In a letter dated June 11, 1997, Jeremiah J. Sullivan, Special Agent in Charge, U.S. Customs Service, Buffalo, New York, requested that the office of Investigator Dana Andrews, Acting Manager, Canada Customs Investigations, Hamilton Region, serve summons on Brown and Streamflo, care of Brown. Plaintiff's Exhibit A.

<sup>1</sup> The penalty notice itself is not included in the record; in addition, the record does not indicate what was being amended by the April 5 "amended penalty notice."

<sup>2</sup> No such petitions are included in the record; the only mention of them is in a letter dated July 26, 1993, signed by the Director of the International Trade Compliance Division of the U.S. Customs Service and addressed to the District Director of Customs in Buffalo, New York. Plaintiff's Exhibit J.

<sup>3</sup> Defendant's petition seeking mitigation of the proposed penalty is not included in the record, nor is Customs' response to Brown. Plaintiff's Exhibit-J, a letter from the International Trade Compliance Division of the U.S. Customs Service to the District Director of Customs in Buffalo, New York, makes reference to Defendant's petition and addresses in detail the allegations it purportedly makes. In the letter, the writer orders the Buffalo office to quickly provide Brown's counsel with a copy of its decision; while the Plaintiff's Response to Defendant's Motion ("Plaintiff's Response") suggests that it was provided to Brown, no documentation contained in the record supports that claim. *See* Plaintiff's Response at 37.

<sup>4</sup> Plaintiff's Response contends Defendant was informed of his right to file a supplemental petition in its copy of the Customs decision of April 5, 1993. *See* Plaintiff's Response at 37.

On June 18, 1997, Brown was personally served with the Summons and Complaint in this case in Burlington, Ontario, Canada, by a "Canada Customs Investigator" named Mark Leonard ("Leonard"). Defendant's Exhibit 1; Plaintiff's Exhibit B. Leonard executed a "declaration of service" on June 18, 1997, Defendant's Exhibit 1, and another on January 13, 1998, Plaintiff's Exhibit B.<sup>5</sup>

Defendant filed his Answer on August 25, 1997. In the Answer, Defendant lists as his fifth affirmative defense that, "[t]his Court lacks personal jurisdiction over defendant."

On December 15, 1997, Defendant filed his Motion to Quash Service of Process and Dismiss for Lack of Personal Jurisdiction, Failure to Plead Fraud with Particularity, Failure to State a Claim Under 19 U.S.C. § 1592, and to Dismiss Time-Barred Claims.

#### IV DISCUSSION

##### A

##### DEFENDANT WAIVED HIS DEFENSE OF INSUFFICIENCY OF SERVICE OF PROCESS BY FAILING TO RAISE IT IN HIS FIRST RESPONSIVE PLEADING

The Supreme Court has observed that "[b]ecause the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). To avoid waiving that right through implication, defendants once had to contest personal jurisdiction through a special appearance. Fed. R. Civ. P. 12 eliminated the need to plead specially in federal court. Rule 12(b) provides that "[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion."<sup>6</sup>

It is, however, essential that a defendant raise the defenses of lack of jurisdiction over the person, insufficiency of process and insufficiency of service of process in his or her first motion or responsive pleading. US-CIT R. 12(g) and 12(h)(1), and corresponding Fed. R. Civ. P. 12(g) and 12(h)(1), provide that those defenses are waived unless they are asserted in the defendant's first defensive paper, whether that be a pre-answer Rule 12 motion or an answer or an amendment thereof permitted as a matter of course. Courts have interpreted this provision strictly. See *Trustees of Central Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 733 (7th Cir. 1991) (waiver may be found as a result of a failure to raise the defense in the defendant's first pleading); *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 738 (1st Cir. 1983) (defendant wishing to raise a Rule 12(h)(1) defense must do so in its first defensive move).

<sup>5</sup>In the June 18, 1997 declaration, Leonard declares "under penalty of perjury" that he personally served Brown. Defendant's Exhibit 1. In the January 13, 1998 declaration, Leonard adds that he was thirty-five years old at the time of the service; that he is, under the laws of Canada and Ontario, a person competent to personally serve such process upon an individual; and that he served Brown in the city of Burlington, Ontario, Canada. Plaintiff's Exhibit B.

<sup>6</sup>The objective of the Rule is to eliminate unnecessary delay at the pleading stage by requiring the defendant to advance up-front every available Rule 12 defense and objection he or she may have that is assertable by motion. 5A Wright & Miller, *Federal Practice and Procedure* § 1384, at 726 (2d ed. 1990).

In Brown's first responsive pleading, he asserts: "[t]he Court lacks personal jurisdiction over defendant." Answer at 3. In his Motion to Quash Service of Process and Dismiss for Lack of Personal Jurisdiction, Brown argues lack of personal jurisdiction and insufficiency of service of process. By objecting to the exercise of personal jurisdiction in his Answer, did Defendant preserve the right to raise an objection to service of process in his Motion?

The defenses of "lack of jurisdiction over the person" and "insufficiency of service of process" are separately numbered in USCIT R. 12. See, USCIT R. 12(b)(2), (4). If possible, a statute must "be construed in such a fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). There would be no reason to separately list insufficient service if the defense of lack of personal jurisdiction subsumed both of them.

The majority of courts have held that the two defenses must be raised separately in the first responsive pleading. In *Roque v. United States*, 857 F.2d 20, 22 (1st Cir. 1988), the First Circuit held that "[i]f the true objection is insufficient service of process, we do not think it is too much to require a litigant to plainly say so. The [defendant] should not couch its true objections to the sufficiency of service in the garb or formalistic incantations of lack of personal jurisdiction \* \* \*."

Similarly, the court in *Federal Home Loan Mortgage Corp. v. Dutch Lane Assocs.*, 775 F. Supp. 133, 137 (S.D.N.Y. 1991), examined the language of Rule 12(b) and determined that there is no implication "that any one of the listed defenses may be raised or preserved by raising one of the other listed defenses." In that case, just as in this case, one of the defendants' affirmative defenses stated, "[t]his court does not have personal jurisdiction over [the] defendants \* \* \*." *Id.* The Federal Home Court held that such language did not sufficiently incorporate an insufficiency of service of process defense to preserve it for specification in later motions:

If the Federal Rules of Civil Procedure manage to clearly and separately identify an "insufficiency of service of process" defense from a "lack of jurisdiction over the person" defense, it places no meaningful burden on defendants to require them to do the same. Allowing parties to actively engage the judicial process yet delay in raising issues of technical defects in the proper form of service of process that could have been easily cured early on makes little sense and merely wastes precious judicial time and resources.

*Id.*

By omitting the defense of insufficiency of service of process from his first responsive pleading, Brown waived it. USCIT R. 12(h). Defendant was given a 30 day extension of time to file an Answer,<sup>7</sup> which made no mention of service of process. He waited four months after filing his Answer to file his Motion to Quash Service. By that point Brown had lost the opportunity to raise a new USCIT R. 12(b) defense.

<sup>7</sup> Court's Order dated July 8, 1997.

## B

DEFENDANT WAS SERVED IN ACCORDANCE WITH THE  
HAGUE SERVICE CONVENTION

Although Brown waived his defense of insufficient service of process, his arguments also fail on the merits.

Brown asserts that he was not served with legal process in accordance with The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361 ("Hague Service Convention" or "Convention"), reprinted in 28 U.S.C.A. Fed. R. Civ. P. 4, at 210-229 (1992). Motion to Dismiss at 5-7. While service did not comply with the method of service emphasized by Defendant, Motion at 6-7, it did comply with Articles 10(b) and 10(c), two alternate methods of service prescribed by the Convention.

Defendant also contends that the return of service filed with the Court is not acceptable evidence of service of the Summons and Complaint. Motion to Dismiss at 7-8. To the contrary, the proof of service and amended proof of service do, in accordance with USCIT R. 4(l), sufficiently demonstrate that Brown was personally served.

## 1

SERVICE COMPLIED WITH ARTICLES 10(b) AND 10(c) OF THE  
HAGUE SERVICE CONVENTION

The Hague Service Convention is an international treaty to which the United States and Canada are signatories. The scope of the Convention is set forth in its first article: it "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Convention Art. 1. The Supreme Court has held this language mandatory and that "the Convention preempts inconsistent methods of service prescribed by state law in all cases to which it applies." *Volkswagenwerk Aktiengesellschaft v. Schulnk*, 486 U.S. 694, 699 (1988).<sup>8</sup>

It was necessary, in this civil case, to transmit the Summons and Complaint for service abroad because Plaintiff is the United States of America and Defendant is a resident of Ontario, Canada. See Compl. at ¶ 4. Thus, Plaintiff was required to make service pursuant to the Hague Service Convention.

The principle mechanism for service of process under the Convention is set forth in Articles 2 through 7. Each signatory country is required to establish a central authority to receive requests from other countries for service of judicial documents. Convention Art. 2. Once a central authority receives a request in the proper form, it must serve the documents by a method prescribed by the internal law of the receiving state or by a method that the sender requests, provided that the method is compat-

<sup>8</sup> The Convention was formulated in 1964 by the Tenth Session of the Hague Conference of Private International Law. *Schlunk*, 486 U.S. at 698 (citations omitted). It was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad. *Id.* The Convention entered into force for the United States on February 10, 1969, 20 U.S.T. 361, and for Canada on May 1, 1969, 28 U.S.C.A. Fed. R. Civ. P. 4, at 124 (Supp. 1997).



ible with local law. *Id.* at Art. 5. The central authority then provides the sender with a certificate of service that conforms to a specified model. *Id.* at Art. 6.

In its accession to the Convention, Canada lists the Ministry of the Attorney General for Ontario as the central authority in Ontario designated to handle transmission and execution of requests for service. Canada, Notification in Conformity with Article 31, Paragraph c, of the Convention, at Declaration (A)(1), *reprinted in* 28 U.S.C.A. Fed. R. Civ. P. 4 at 123-125 (Supp. 1997) ("Canadian Accession Notification"). The Government concedes that it did not transmit Defendant's Summons and Complaint through this authority. *See* Plaintiff's Response at 8 n.7. Instead, it transmitted the documents through Canadian Customs. *Id.* at 13. Thus, Brown's contention that "the government failed to comply with the requirements of Article 5 of the Hague Service Convention" is correct. Motion to Dismiss at 7.

However, "[a] state also may consent to methods of service within its boundaries other than a request to its central authority." *Schlunk*, 486 U.S. at 699. The Hague Service Convention prescribes several other methods of achieving service of process: through diplomatic or consular agents of the sending State (Art. 8); through consular channels to authorities within a contracting State who are authorized by that State to effect service (Art. 9); through the judicial officers, officials, or other competent persons of the State of destination (Art. 10); pursuant to any other agreement between the States involved (Art. 11); or pursuant to the internal law of the receiving State (Art. 19).

Service of process in this case conformed to two of the alternate methods of service found in Article 10 of the Convention. Article 10(b) provides that, if the State of destination does not object, the Convention "shall not interfere with \* \* \* the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination." Article 10(c) says that, if the receiving state does not object, the Convention shall not interfere with "the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination." In its accession to the Convention, Canada expressly notes that it "has not declared to object to" either of these methods of service. *See* Canadian Accession Notification, Declaration III.

The issue of who qualifies as a "competent person" under Articles 10(b) and 10(c) of the Convention is one of first impression in this Court. Commentators have noted that "[t]here is uncertainty as to the identity of the 'competent persons' who can be requested to make service abroad and as to the law for determining competency. \* \* \*" Gary B. Born & David Westin, *Int'l Civil Litig. in United States Courts*, 141 (1989). It is unclear "whether the authority of the 'competent persons' who may undertake to serve process in the state of destination is to be determined



by the law of the state of origin, or by the law of the state of destination." Bruno A. Ristau, *Int'l Judicial Assistance Civil and Commercial*, Volume 1 § 4-3-5 (Int'l Law Institute, 1995 Revision). Those who would be manifestly "competent" to effect process abroad under American law may not be so under the law of other countries. *Id.*<sup>9</sup>

Articles 10(b) and 10(c) have been the focus of litigation in only a few cases. In no case does the court provide a reasoned explanation of how it determined that service had been effected by and through "competent persons."<sup>10</sup>

The negotiating history of Articles 10(b) and 10(c) sheds little light on the intention of the draftsmen, although it does note:

**M. Amram** (Etats-Unis) est préoccupé par la question de savoir ce que les auteurs de l'avant-projet ont entendu par: *autres personnes compétentes*.

**Le Rapporteur** apprend à M. Amram que ce membre de phrase a été ajouté pour répondre à la demande du Royaume-Uni d'inclure les notifications faites par l'intermédiaire des *solicitors*.

**M. Amram** (Etats-Unis) conclut que, dès lors, le sens de cette phrase pourrait être différent selon les lois de chaque Etat, ce à quoi cependant il ne fait pas objection."

*Actes et Documents de la Dixième Session*, Conférence de la Haye de Droit International Privé, at 238 (Oct. 7-28, 1964).

Canada does not indicate in its accession to the Convention who it considers "competent" to transmit, receive and serve process papers under Articles 10(b) and 10(c). Canada does not explicitly object to or qualify the language of either provision. See Canadian Accession Notification, Declaration III.

Canada does head its declaration acceding to Articles 10(b) and 10(c): "Service through judicial officers, notably 'huissiers' [bailiffs or deputy sheriffs], etc., of the requested State." *Id.* If headings are part of the official text, this could be read to indicate that Canada intended transmission of documents through judicial officers to be the only alternative to transmission through a central authority.

Canadian Government practice, however, demonstrates a contrary intention. The Canadian customs officers who served process on Defendant are servants of the Government of Canada. If the Canadian Government believed its third Declaration limited service of process solely

<sup>9</sup> Ristau notes:

Under American law, private persons may (either by special appointment, see Rule 4(c), Fed. R. Civ. P., or under general statutory authority) serve process. Unlike most civil law countries, the U.S. has no general requirement that process be served by officials. It has been commonplace for American attorneys to request foreign attorneys, or individuals who happen to travel to a foreign country, to serve process on persons in those countries by personal delivery. Such foreign attorneys or private persons are manifestly "competent" under American law to effect service abroad. It is, however, unlikely that they are "competent" to effect valid service under the laws of most civil law jurisdictions."

*Supra*, at § 4-3-5.

<sup>10</sup> In *Tamari v. Bache & Co.*, 431 F. Supp. 1226 (N.D. Ill. 1977), *aff'd*, 565 F.2d 1194 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978), a "court appointed process server" personally served the defendant in Paris. The court, without explanation, held that such service "would appear to fall within the provisions of Article 10(b)" of the Hague Service Convention. *Id.* at 1229. In *Tax Lease Underwriters, Inc. v. Blackwall Green, Ltd.*, 106 F.R.D. 595, (E.D. Mo. 1985), the Court had previously entered an order authorizing an English solicitor to serve a resident of the United Kingdom. The court, without explanation, held that this method of service complied with Articles 10(b) and 10(c). *Id.* at 596.

to judicial officers, it had only to speak to prohibit its Customs agents from serving process. By standing mute, the Canadian Government not only approved such activities, but affirmed their validity.

The rest of Canada's third declaration further supports an expansive interpretation of who is "competent" to transmit, receive and serve process in Canada under Articles 10(b) and 10(c). Canada inserts an "etc." after "judicial officers" in its heading to Declaration III, impliedly including in its accession to Articles 10(b) and 10(c) the "officials," "other competent persons," and "person[s] interested in a judicial proceeding" mentioned in those provisions. *Id.*

It is not surprising that Canada does not impose strictures on the methods of service provided for in Articles 10(b) and 10(c) of the Convention: Canada's internal laws are themselves flexible about who is authorized to affect service of process. The laws of Ontario governing service of process do not proscribe government officials or even private persons from effecting service of process.<sup>11</sup> In Ontario, personal service is an accepted method of service.<sup>12</sup> Throughout Canada, personal service is the preferred method of service. See *Delaire v. Delaire* [1996] 147 Sask.R. 161, at ¶ 46, quoting J.G. Castel in *Canadian Conflict of Laws*, 2nd Ed (Toronto, Butterworths 1986) ("In all the common law provinces and territories, personal service of process is the foundation of jurisdiction in actions in personam.")<sup>13</sup>

In this Court, "any person who is not a party and who is at least 18 years of age" is competent to effect service of a summons and complaint. USCIT R. 4(c).

Transmission of the Summons and Complaint from the U.S. Customs Service to Canada Customs clearly conformed to Article 10(b) of the Convention. "Officials" and "competent persons" were involved in both the United States and Canada. Jeremiah J. Sullivan sent a letter to Investigator Dana Andrews, Acting Manager of Canada Customs Investigations, Hamilton Region, requesting that Investigator Andrews' Office serve a copy of the Summons and Complaint in this case on Brown. Plaintiff's Exhibit A. Special Agent Sullivan is an "official" pursuant to Article 10(b): according to the Government, he is "the head of the Office of Investigations for the U.S. Customs Service in Buffalo, New York, and is responsible for all investigations conducted by that office." Plaintiff's Response at 12.

Special Agent Sullivan transmitted Defendant's Summons and Complaint to an "official" and "competent person" of the State of destina-

<sup>11</sup> See Rule 16, Rules of Civil Procedure, reprinted in Gary D. Watson & Michael McGowan, *Ontario Civil Practice* 1998, 358-368.

<sup>12</sup> Rule 16.01(1) of the Rules of Civil Procedure in Ontario provides that "[a]n originating process shall be served personally as provided in rule 16.02 or, \* \* \* by an alternative to personal service as provided in rule 16.03." *Id.* at 359. Rule 16.02(1) states that where a document is to be served personally on an individual, the service shall be made "by leaving a copy of the document with the individual." *Id.* at 360. Defendant was served in accordance with this Rule.

<sup>13</sup> An even less direct form of service is sufficient if the court is satisfied that the defendant has received actual notice of the proceedings. See, e.g., *McGillis v. Hirtle* [1992] 128 A.R. 83, at ¶ 19 ("If the court is satisfied that the action has come to the attention of the defendant the object of service has been satisfied").

tion: Investigator Andrews was "Acting Manager" of a regional Canada Customs Investigations office. Plaintiff's Exhibit A.

Andrews then transmitted the documents to another "competent person": Canada Customs Investigator Mark Leonard. Plaintiff's Exhibit B. In Leonard's Declaration of Service dated January 13, 1998, he affirms that he served the Summons on Defendant pursuant to Agent Sullivan's written request. *Id.*<sup>14</sup> Leonard also affirms that he was over eighteen years old when he effected service. *Id.* Thus, service of Defendant was "directly effected" by and through officials and "competent persons," pursuant to Article 10(b).

Service also complied with Article 10(c). 10(c) provides that "any person interested in a judicial proceeding" may effect service. There is no case authority that sheds light on who qualifies as a "person interested in a judicial proceeding," (and the negotiating history of the Convention is not helpful). Plaintiff argues that "[c]onsidering that the fraud at issue in this case was investigated by Sullivan's office, Sullivan clearly also is an 'interested person' in this litigation." Plaintiff's Response at 12-13. Sullivan is the head of the Customs office that discovered and investigated Defendant's alleged violations of United States law; as such, he qualifies as an "interested person" who is eligible to effect service pursuant to Article 10(c) of the Hague Service Convention.

2

THE DECLARATIONS OF SERVICE ARE ACCEPTABLE EVIDENCE OF THE  
DELIVERY OF THE SUMMONS AND COMPLAINT TO DEFENDANT

As further support for his Motion to Quash Service, Defendant argues that the Proof of Service of the Summons and Complaint is "defective in several respects." Motion to Dismiss at 7. He specifically alleges that it was not executed by a person designated by Declaration (A)(3) of Canada's accession to the Hague Convention, does not specify the place of service, was not written in compliance with the requirements of 28 U.S.C. § 1746 for a declaration in lieu of affidavit executed abroad, and was not filed with the court and provided to Defendant's counsel in a timely manner. *Id.* at 7-8. Defendant cites no authority to support any of these contentions; none are valid arguments for quashing service of process in this case.

Defendant argues in his motion that the Proof of Service was not executed by an authorized person, as required by Article 6 of the Hague Service Convention and Declaration (A)(3) of Canada's Accession Notification.<sup>15</sup> As discussed above, service in this case was effected pur-

<sup>14</sup> Defendant does not dispute that service took place in the manner described by Leonard in his declarations of service.

<sup>15</sup> Article 6 of the Convention provides that "[t]he Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

"The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

"The applicant may require that a certificate not completed by a Central Authority or a judicial authority shall be countersigned by one of these authorities.

"The certificate shall be forwarded directly to the applicant."

suant to Articles 10(b) and 10(c) of the Hague Service Convention. Articles 10(b) and 10(c) are separate methods of transmission from the "Central Authority" mechanism that is governed by Article 6; thus, Plaintiff was not required to follow the procedures of Article 6 of the Convention and Declaration (A)(3) of Canada's Accession Notification.

The Government's Proof of Service did comply with the rules of this Court. Proof of service of the Summons and Complaint is governed by USCIT R. 4(l). That Rule states that if service is effected under Rule 4(f)(1), as it was in this case,<sup>16</sup> proof of service must be made "pursuant to the applicable treaty or convention." *Id.* Articles 10(b) and 10(c) have no special enumerated procedures for establishing proof of service. In instances in which service is effected abroad and the applicable international agreement allows other means of service, Rule 4(l) states that proof of service shall "include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court."

The proofs of service that Plaintiff filed with the Court are satisfactory evidence of delivery to Defendant. On June 18, 1997, Leonard, a "Canada Customs Investigator," executed a "Declaration of Service." Defendant's Exhibit 1.<sup>17</sup> In the Declaration, Leonard states that he personally handed a copy of the Summons and Complaint in this action to Brown on June 18, 1997. *Id.* In an amended Declaration of Service executed on January 13, 1998, Leonard adds that he served Brown in the city of Burlington, Ontario; he was thirty-five years old at the time of service; under the laws of Canada and Ontario he is a person competent to personally serve process upon individuals; and Defendant probably knew Leonard as a Canada Customs Investigator because Leonard had met with Defendant on several previous occasions in an official capacity. Plaintiff's Exhibit B.

Defendant does not dispute that he was served by Leonard in the manner described in these detailed proofs of service. In the federal system, "some courts require a showing of 'strong and convincing evidence' to overcome a facially valid return of service generated by a private process server \* \* \* while others simply have suggested that a rebuttable presumption of correctness might apply." *Corcoran v. Shoney's Colonial, Inc.*, 39 Fed.R.Serv.3d 345, 348 (W.D. Va. 1997) (citing *Trustees of Local Union No. 727 Pension Fund v. Perfect Parking*, 126 F.R.D. 48, 52 (N.D.Ill. 1989); *Frof, Inc. v. Harris*, 695 F.Supp. 827, 829 (E.D.Pa. 1998)). Defendant fails to meet his burden under either standard. The detailed and specific declarations of service filed by Plaintiff are satisfactory evidence of service of process for this Court.

Leonard's first declaration of service does not, as Defendant points out, indicate where Defendant was served. Motion to Dismiss at 7. How-

<sup>16</sup> USCIT R. 4(f) states, in relevant part, that service "may be effected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents."

<sup>17</sup> USCIT R. 4(l) states that "[i]f service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof." 28 U.S.C. § 1746 allows an unsworn declaration made under penalty of perjury to replace an affidavit. See discussion *infra*, pp. 23-24.

ever, Rule 4(l) does not, as Plaintiff notes, require proof of service to specify the place of service. Plaintiff's Response at 17. Defendant does not cite any authority to support his contention that such specificity is required.

In any event, on January 13, 1998, Leonard executed a second declaration which indicates that Brown was served in the city of Burlington, Ontario. Plaintiff's Exhibit B. Because Rule 4(l) is liberal about allowing proof of service to be amended, and Defendant does not contend he was prejudiced by the form of the original proof of service, even if the first declaration was insufficient, the Court will admit the second declaration and its specification of the place of service. Rule 4(l) ("The court may allow proof of service to be amended."). See *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389, 1394 n.2 (D.Hawaii 1995) (accepting corrected declarations after finding that the corrected declarations did not prejudice the defendants).<sup>18</sup>

Defendant asserts that Leonard's first declaration was invalid because, while it stated it was being made under penalty of perjury, it did not contain the phrase "under the laws of the United States." Motion to Dismiss at 7-8. Defendant ignores the fact that 28 U.S.C. § 1746 explicitly states that declarations executed outside the United States must follow "substantially" the following form: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct \* \* \* ." (emphasis added). Leonard's first declaration of service did substantially follow that form; it stated that "I [Leonard] declare under penalty of perjury that the foregoing is true and correct." Defendant's Exhibit 1. As Plaintiff points out, the opening statement of the declaration also states that it is being made "[p]ursuant to the provisions of 28 U.S.C. § 1746," thus alerting the reader that the statements contained therein are being made under the laws of the United States. *Id.*; Plaintiff's Response at 17. Leonard's first declaration of service, therefore, conforms to the requirements of the statute.

Only two relevant cases have been cited to this Court, in both of which similar language was found to conform with 28 U.S.C. § 1746. See *Matter of Muscatell*, 106 B.R. 307, 309 (M.D.Fla. 1989) ("as long as the unsworn declaration includes the phrase, 'penalty of perjury,' and states the document is true, the verification requirements of 28 U.S.C. § 1746 will be satisfied"); *Reliance Ins. Co. v. United States*, 23 Cl. Ct. 108, 113 n.2 (1991) (declaration stating that it was made "pursuant to" section 1746 and that it was "true and correct to the best of my knowledge, information and belief" held sufficient, even though it did not include "under penalty of perjury").

Finally, Defendant complains that Plaintiff "belatedly" filed its Proof of Service with the Court and provided Defendant's counsel with a copy.

<sup>18</sup> Defendant also cursorily mentions that the proof of service "does not indicate in any way that Leonard was authorized or qualified to serve legal process under the laws of the Commonwealth of Canada or the Province of Ontario." Motion to Dismiss at 4. This information is not a required part of the proof of service under USCIT R. 4. In any event, the amended service does affirm that "[u]nder the laws of Canada and Ontario, [Leonard is] a person competent to personally serve such process upon an individual." Plaintiff's Exhibit B.

Motion to Dismiss at 7. Defendant points out that almost ten months elapsed between when the Complaint was filed and when Defendant's counsel received a copy of the Proof of Service. Motion to Dismiss at 7. However, Defendant does not indicate when, if ever, he requested a copy of the Proof of Service; nor does he cite any authority for the proposition that in this Court, ten months is an unreasonable period of time to wait to file a proof of service. In fact, Defendant's argument is at odds with the plain language of USCIT R. 4(l), which provides that "[f]ailure to make proof of service does not affect the validity of the service." Accordingly, even if no proof of service had been filed (which is not the case), this Court would not be deprived of jurisdiction over Brown. See, e.g., *Nelle v. Ciotti*, 151 F.R.D. 568, 570 (E.D.Penn. 1993); *Fox v. Regie Nationale des Usines Renault*, 103 F.R.D. 453, 455 (W.D.Tenn. 1984).

As there is no proof that Defendant suffered prejudice by receiving a copy of the Proof of Service when he did, because Defendant is not arguing that he was not in fact served by Mr. Leonard on June 18, 1997, as the declaration states, and because there are no defects in the declaration, the Court will not quash service simply because the proof of service was not filed immediately after the Complaint was filed.

### C

#### THIS COURT MAY EXERCISE PERSONAL JURISDICTION OVER DEFENDANT

Defendant argues that this Court cannot exercise jurisdiction over him for two reasons: because the Complaint "does not allege that Brown was ever within the United States" and because "the complaint does not show that any of the vaguely alleged acts of Brown in Canada are sufficient to subject him to the personal jurisdiction of this Court, consistent with the requirements of due process." Motion to Dismiss at 9. His arguments must fail, however, since the acts that Brown is alleged to have committed in Canada are sufficient to constitute "minimum contacts" with the United States, and the exercise of personal jurisdiction over Defendant comports with "traditional notions of fair play and substantial justice." *International Shoe v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted).

An individual's contacts with a forum state are not to be judged according to his or her employer's activities there; however, status as an employee "does not somehow insulate" that person from jurisdiction. *Calder v. Jones*, 465 U.S. 783, 790 (1984). Instead, a nonresident employee's contacts with the forum state "must be assessed individually." *Id.* The Court must evaluate those individual contacts using a two-part test: did the defendant have "minimum contacts" with the forum state, and does the exercise of jurisdiction over the defendant comport with "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316.

The "minimum contacts" standard of *International Shoe* was elaborated by the Supreme Court in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958): minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activi-



ties within the forum State \* \* \*." The "purposeful availment" requirement is met when the defendant's contacts with the forum State proximately result from actions that create a "substantial connection" with the forum State. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citing *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

The majority in *Asahi Metal Industry Co., v. Superior Court of California*, 480 U.S. 102, 112 (1987), emphasized that "[t]he 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." (citations omitted). The Court held that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* Examples of conduct directed toward the market in a forum State include designing the product for the market in that state, advertising there, establishing channels for providing regular advice to customers there, or marketing the product through a distributor who has agreed to serve as the sales agent there. *Id.*

To determine whether the exercise of jurisdiction in a particular case "offends traditional notions of fair play and substantial justice," the Court must consider such factors as the burden imposed on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. *Id.* at 113.

Brown argues that he does not have minimum contacts with the United States sufficient to subject him to the personal jurisdiction of this Court. He first contends that Plaintiff's Complaint "fails to establish any factual basis for attributing the acts of the corporate defendant Streamflo to the individual Defendant Brown." Motion to Dismiss at 9.

This Court has held in other actions involving violations of 19 U.S.C. § 1592 that "[a] corporate officer may be liable for false statements made by a corporation if the officer knowingly participated in the deception or failed to correct the false statements upon learning of them." *Kab Trade Co.*, 1997 WL 155397 at \*3; see also *United States v. Appendagez*, 5 CIT 74, 80, 560 F. Supp. 50, 54 (1983) (corporate officers may become liable for the illegal actions of others in the corporation if they knowingly participate in such actions).<sup>19</sup>

The Complaint alleges that Brown not only knowingly participated in acts constituting violations of § 1592, but also ordered and directed his employees to take those actions. Paragraph 12 alleges that Brown and co-Defendant David Islip ordered employees to remove "Made in Taiwan" country of origin markings from unmodified merchandise which had been imported into Canada from Taiwan, and to replace the markings with "Made in Canada" or "Canada" markings. The same paragraph alleges that Brown and Islip ordered employees to remove all

<sup>19</sup> There is no proof in the record of the corporate nature of Streamflo. The Complaint states that Streamflo "is, and at all times relevant to this complaint was, a Canadian corporation \* \* \*." Compl. at ¶ 5.



country of origin markings from merchandise after it entered the United States, and that they ordered employees to lie about the true origin of the merchandise if questioned by U.S. Customs. Nowhere in this paragraph is Streamflo, the corporate entity, mentioned; Brown is accused of acting on an individual basis. The same is true of paragraph 19, which accuses Brown and Islip of ordering employees to falsely describe the composition of merchandise on customs entries and documents.

Under *Gould*, 935 F.2d at 1274, the Government has alleged facts sufficient to support its claim that Defendant committed fraudulent, grossly negligent, or negligent violations of 19 U.S.C. § 1592.

Brown also argues that the acts he is alleged to have committed are not sufficient to subject him to the personal jurisdiction of this Court. He emphasizes that all of the alleged acts took place in Canada. Motion to Dismiss at 9. However, as Plaintiff properly indicates, Defendant "need not have been physically present in the United States or performed these actions within the United States in order to fall within the jurisdictional purview of this Court." Plaintiff's Response at 27. As long as Defendant purposefully directed his actions toward the forum state, it does not matter where those actions were taken.

The Complaint accuses Defendant of purposefully directing actions toward the United States. Brown was General Manager of a company that introduced into the commerce of the United States multiple lots of merchandise consisting of strainers, pump connectors and check valves. Compl. at ¶ 4, ¶ 9. He wrote to the United States Customs Service requesting a ruling on which country should be indicated as the "country of origin." Plaintiff's Exhibit E. Brown, on behalf of Streamflo, also submitted drawback claims to Revenue Canada for merchandise shipped to the United States. Plaintiff's Exhibit G. These documents show that Brown knew the merchandise at issue was being imported into the United States, and that he was directly involved in the importation process.

The Complaint also alleges that Defendant knowingly and intentionally ordered his employees to mislabel and misidentify goods that were being exported into the United States. The contacts alleged with the United States were not "random," "fortuitous," or "attenuated": such acts intentionally pollute the United States stream of commerce. See *Burger King*, 471 U.S. at 475.<sup>20</sup>

The exercise of jurisdiction also comports with "traditional notions of fair play and substantial justice." The United States has a great interest in enforcing its customs fraud laws against foreign individuals who are

<sup>20</sup> Defendant mistakenly bases his arguments almost exclusively on the decision in *Asahi* that a foreign party's awareness that its products will enter the stream of commerce of the United States is not alone sufficient to establish personal jurisdiction. Defendant's Motion to Dismiss at 9 and Defendant's Reply Memorandum of Law in Support of Defendant Brown's Motion ("Defendant's Reply") at 8 (citing *Asahi*, 480 U.S. at 112). As Plaintiff points out, Brown's case differs significantly from that of the defendant in *Asahi*. See Plaintiff's Response at 26. In *Asahi*, the defendant was a Japanese manufacturer that sold tire valve assemblies to a Taiwanese manufacturer who incorporated the assemblies into tire tubes which it then sold around the world. 480 U.S. at 106. Brown, on the other hand, is accused of participating in the direct exportation into the United States of goods which he personally caused to be mislabeled and misidentified. His individual actions, alleged by Plaintiff, do constitute the "minimum contacts" needed to allow this Court to exercise personal jurisdiction over him.

involved in the direct importation of products into its stream of commerce. It is not unreasonable for an individual who sends products into the United States and who deals with U.S. Customs on a regular basis to expect to defend in the United States a suit involving alleged violations of United States customs laws. "[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. Brown did not even address the issue of reasonableness in his motion, let alone carry the burden of establishing that defending a case in this Court would be substantially inconvenient. The exercise of personal jurisdiction over Defendant is reasonable and appropriate in this case.

#### D

##### THE GOVERNMENT ALLEGED FRAUD WITH SUFFICIENT PARTICULARITY

The Complaint alleges that Brown fraudulently submitted false statements and documents to Customs in violation of 19 U.S.C. § 1592(a). See Compl. ¶¶ 9-27; 83-86. According to USCIT R. 9(b), all averments of fraud of must state with "particularity" the "circumstances constituting fraud or mistake." Brown argues that the allegations made in the Government's Complaint are general and conclusory, and that, therefore, the Complaint does not allege fraud with sufficient particularity under USCIT R. 9(b). Defendant's Motion to Dismiss at 10-12.

The purposes of Rule 9(b) are to ensure that "a defendant is afforded fair notice of the nature of Plaintiff's claim and the grounds upon which it is based," and "that allegations of fraud will not be advanced lightly or without some factual basis." *United States v. Priscilla Modes, Inc.*, 9 CIT 598, 599 (1985), (quoting *Fulk v. Bagley*, 88 F.R.D. 153, 164 (M.D.N.C. 1980)). The rule, however, must be read in conjunction with USCIT R. 8, which dictates that each averment of a pleading of fraud be "simple, concise and direct." 2 *Moore's Federal Practice* § 9.03, at 9-19 and 9-28 (3d ed. 1998). Thus, while Rule 9(b) "assures that a defendant will be alerted to the particular transactions in question and be able to mount an effective and meaningful defense," *United States v. F.A.G. Bearings Corp.*, 7 CIT 8, 9, (1984), it does not require the pleading of detailed evidentiary matter. *Jac Natori Co.*, 17 CIT at 350, 821 F. Supp. at 1517.

The "circumstances" that must be pleaded with particularity are more than the technical elements of fraud. 5 Wright & Miller, *Federal Practice and Procedure* § 1297, at 608-12 (2d ed. 1990). A fraud pleading must include informational elements of "who, what, when, where, and how: the first paragraph of any newspaper story." *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990). Most courts have required the claimant to allege at a minimum the identity of the person who made the fraudulent statement; the time, place, and content of the misrepresentation; the resulting injury; and the method by which the misrepresent-

tation was communicated. 2 *Moore's Federal Practice* § 9.03, at 9-18 n.12 (3d ed. 1998).

In this Court, plaintiffs were held to have alleged fraud with sufficient particularity under USCIT R. 9(b) when they set forth in their complaints the kinds of informational elements mentioned above. In *United States v. F.A.G. Bearings Corp.*, 8 CIT 201, 206-07, 615 F. Supp. 562, 566 (1984), the Court held that USCIT R. 9(b) was satisfied by a complaint that specified the "time, place, and contents" of the alleged false representations, details which "fairly apprise defendant of the charges against it so that an answer may be prepared."<sup>21</sup>

In this case, the Complaint states the informational "circumstances" constituting fraud. It establishes the "time, place, and contents" of each of Defendant's alleged misrepresentations. Paragraph 11 accuses Defendant of knowingly placing, or causing others to place, false country of origin markings on merchandise entering the United States through the port of Buffalo from Canada from September 11, 1987, through August 27, 1992, by means of 390 entries identified in Plaintiff's Exhibit A. This paragraph lists all of the required, "particular" elements of alleged fraud: the "who" involved is Defendant; the "where" is the port of Buffalo; the "what" is causing to be placed or placing false markings on merchandise; and the "when" is the dates and entries listed.

Plaintiff provides further details about this instance of fraud. The Complaint specifies that Brown would: (1) order employees to remove "Made in Taiwan" markings from unmodified merchandise and replace them with "Made in Canada" or "Canada" markings; (2) order employees to remove all country of origin markings after the merchandise entered the United States; and (3) order employees to claim, if ever questioned by Customs, that they knew nothing about the country of origin of the merchandise, or that its country of origin was Canada. Compl. at ¶ 12. This level of specificity goes well beyond the general "time, place, and contents" pleading requirement. Plaintiff has certainly pleaded "with sufficient particularity to enable the defendant to respond" to this allegation of fraud. *Jac Natori Co.*, 17 CIT at 351, 821 F. Supp. at 1517.

The rest of the Complaint provides the same level of detail. Paragraph 15 accuses Defendant of knowingly filing or causing others to file false documents with Customs at the port of Buffalo, from October 15, 1987, through August 27, 1992. Those documents, Plaintiff claims, falsely describe the merchandise introduced into the United States (by means of specific entries identified in Plaintiff's Exhibit B) as made of cast iron and as having been made in Canada. Compl. at ¶¶ 15-17. Once again, the "who," "what," "where," and "when" of these alleged misrepresentations are all set forth. The Complaint does not merely "parrot[] \*\*\* statutory language without necessary facts \* \* \*," as Defendant main-

<sup>21</sup> This standard has guided the Court of International Trade decisions that have subsequently addressed this issue. See *Jac Natori Co.*, 17 CIT at 351, 821 F. Supp. at 1517; *United States v. Obron Atlantic Corp.*, 18 CIT 771, 777-78, 862 F. Supp. 378, 383-84 (1994); *Kab Trade Co.*, 1997 WL 155397 at \*5.

tains in his Motion to Dismiss at 12, (*quoting Gregoris Motors v. Nissan Motor Corp.*, 630 F. Supp. 902, 913 (E.D.N.Y. 1986)). Rather, the Complaint directs Defendant to specific dates, entries, and representations—"necessary facts" to which Defendant is free to respond.<sup>22</sup>

Brown also argues that because the Complaint lumps together his acts with those of other defendants, it violates Rule 9(b). Motion to Dismiss at 12. While the Complaint does group Brown together with other defendants and accuses them of identical acts, it does not violate Rule 9; the fact remains that the Complaint does, as the Rule requires, accuse Brown of participating in particular fraudulent acts, at particular times and in particular circumstances.

Finally, Brown claims that the Complaint "lacks any allegation of the factual basis which gives rise to a 'strong inference' of fraudulent intent." Motion to Dismiss at 12, (citing *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990)). Although Rule 9(b) states that intent "may be averred generally," courts have required plaintiffs to provide a strong inference of fraudulent intent. *Campaniello Imports, Ltd. v. Saporiti Italia S.A.*, 117 F.3d 655, 663-64 (2d Cir. 1997). However, the facts alleged by Plaintiff in this case allege a fraudulent intent: the Complaint alleges Brown ordered the merchandise to be mismarked, he told employees to lie to Customs, and false documents were filed, all in the pursuit of reduced duty rates. See Compl. at ¶ 12, ¶¶ 15-19.<sup>23</sup> There have been, at this stage of the case, more than enough specific allegations of fraud adduced to survive a motion to dismiss. Accordingly, that basis of Brown's Motion must be denied.

## E

### DEFENDANT RECEIVED DUE PROCESS AT THE ADMINISTRATIVE LEVEL

Brown argues that the Complaint should be dismissed because he was given seven, rather than 30 days, to respond to the prepenalty notice sent to him by Customs. Motion to Dismiss at 13-14. While it is true he was not given the amount of time to respond required under Customs guidelines, we retain jurisdiction because Defendant was afforded sufficient opportunity to be heard at the administrative level.

<sup>22</sup> Brown's case is easily distinguished from *United States v. Chow*, 17 CIT 1372, 841 F. Supp. 1286 (1993), the case he claims contains allegations "almost identical" to those in this case. Defendant's Motion to Dismiss at 11. In *Chow*, the Court ruled that while the Complaint described in detail the fraudulent acts of other parties, it did not particularly set forth circumstances constituting the defendant's individual participation in fraud. The times, places, or content of Chow's participation in any fraudulent acts were not specified: "[t]here is a lack of particularity in the complaint concerning not only how [defendant] aided and abetted the alleged fraud, but what it was he did to aid and abet the alleged fraud." *Chow*, 17 CIT at 1377, 841 F. Supp. at 1290. Brown's case significantly differs: as is discussed above, the Complaint against him spells out in detail his alleged involvement in fraudulent acts.

<sup>23</sup> In the case cited by Defendant, the plaintiff believed that the bank handling her stock sale had made a "corrupt bargain" with three favored customers. *Wexner*, 902 F.2d at 173. However, the plaintiff was unable to set forth with particularity the facts of this alleged bargain: "[c]onspicuously absent" from her complaint were "any allegations as to who leaked Wexner's plans, or when and to whom the information was leaked." *Id.* at 172. That case is markedly different from this case: here, Plaintiff's Complaint does provide "who," "when," and "why" information about the fraudulent acts alleged. Thus, by this standard as well as all others proffered by Defendant, the Government's Complaint did plead fraud with sufficient particularity.

## 1

DEFENDANT DID NOT RECEIVE THE AMOUNT OF  
PREPENALTY NOTICE REQUIRED UNDER CUSTOMS GUIDELINES

Section 1592, subsection (b)(1), of Title 19 of the United States Code dictates that when Customs has reasonable cause to believe that there has been a violation of 1592(a), it shall issue to the person concerned a written notice of its intention to issue a claim for a monetary penalty. Customs guidelines state that a person who receives such a prepenalty notice shall have 30 days from the date of mailing of the notice to make a written and an oral presentation. 19 C.F.R. § 162.78(a). However, "if less than 1 year remains before the statute of limitations may be asserted as a defense," the named person may be required to respond within "a shorter reasonable period of time, but not less than 7 days." *Id.*

The statute of limitation for cases brought under 19 U.S.C. § 1592 are set forth in section 1621 of the same title. When the limitation period begins to run depends on the level of culpability alleged: for fraud, a five year period is measured from the date of the discovery of the fraud; for allegations of negligence or gross negligence, a five year limitations period begins on the date the alleged violation was committed. That difference in how limitations periods are calculated was at issue in two notable cases cited by Defendant.

In *Chow and United States v. Stanley Works*, 17 CIT 1378, 849 F. Supp. 46 (1993), related cases that share similar facts, this Court dismissed actions based partly on the fact that Customs had not given the defendants the time to respond to prepenalty notices that was appropriate for their alleged levels of culpability. The defendants in each case were accused only of fraudulent violations of 19 U.S.C. § 1592, and, on the day that prepenalty notices were mailed to them, two years and five months remained until expiration of the five-year statutory periods of limitation. *Chow*, 17 CIT at 1375, 841 F. Supp. at 1289; *Stanley Works*, 17 CIT 1381, 849 F. Supp. at 49. However, Customs gave the defendants only seven days to respond to the notices. *Chow*, 17 CIT at 1375, 841 F. Supp. at 1289; *Stanley Works*, 17 CIT at 1381, 849 F. Supp. at 49.

The Court held in each case that such truncated response periods had denied the defendants a reasonable opportunity to be heard, and that pursuant to its guidelines, Customs should have provided thirty-day response periods. *Stanley Works*, 17 CIT at 1381-82, 849 F. Supp. at 49-50, *Chow*, 17 CIT at 1376, 841 F. Supp. at 1289-90. For instance, the Court in *Chow* emphasized that only fraud had been alleged throughout the case: "[b]ecause plaintiff did not allege in its complaint, prepenalty notice or penalty notice a violation arising out of gross negligence or negligence, the statute of limitations is not properly measured from 'the date the alleged violation was committed.'" *Chow*, 17 CIT at 1375, 841 F. Supp. at 1288 (quoting 19 U.S.C. § 1621).

Similarly, only fraud was alleged in the prepenalty notice sent to Defendant. Defendant's Exhibit 2. The Complaint indicates that the Customs discovered Defendant's alleged fraud on or about October 30,

1992, and a prepenalty notice was sent to Defendant on March 15, 1993. Compl. at ¶ 23; Defendant's Exhibit 2. Thus, there were more than four years left before the expiration of the limitation period at the time when the notice was sent to Brown. However, Brown, like the defendants in *Chow* and *Stanley Works*, was given only seven days to respond to that notice. These facts suggest that this defendant, too, did not receive the length of time to respond to his prepenalty notice that is required under Customs guidelines.

Plaintiff argues that there is a significant difference between this case and *Chow* and *Stanley Works*: in this case, the prepenalty notice included the tentative determination that Brown's culpability level was fraud, but the Complaint finally accused him of gross negligence and negligence as well as fraud. See Defendant's Exhibit 2; Plaintiff's Response at 34. The Government alleged in its Complaint that the first section 1592 violation took place on September 11, 1987. Compl. at Exhibit A. The prepenalty notice was mailed to Brown on March 15, 1993. At that time less than 1 year did remain before the statute of limitations may have been asserted as a defense to allegations of grossly negligent or negligent Section 1592 violations. As Plaintiff points out, Defendant now raises just such a defense. See Plaintiff's Response at 34; Motion to Dismiss at 14-16. These facts demonstrate, Plaintiff argues, that it was necessary to give Brown only seven days to respond to the prepenalty notice back in 1993.

Plaintiff's arguments fail for several reasons. First, claims of gross negligence and negligence are nowhere mentioned in the prepenalty notice. If the Government was not accusing Brown of either, then it had no more right to shorten the response time in his case than it has in any other fraud case. The Court in *Chow* and *Stanley Works* held that the law did not allow Customs to pursue a supposed in-house "policy" of "calculat[ing] the statute of limitations from the date of the violation (as opposed to the date of discovery of fraud) as a conservative measure." *Chow*, 17 CIT at 1375 n.1, 841 F. Supp. at 1288 n.1; *Stanley Works*, 17 CIT at 1381 n.2, 849 F. Supp. at 49 n.2. The Government in this case is arguing that it should be allowed to employ such "conservative measures": to cover itself in case it decides later to charge a defendant with alternative violations, and need an additional few weeks within the statute of limitations to be able to do so. *Chow* and *Stanley Works* condemn such a practice.<sup>24</sup>

In Brown's case as well as in *Chow* and *Stanley Works*, the statute of limitations was not due to expire for any of the violations alleged in the

<sup>24</sup> Plaintiff cites *United States v. Ziegler Bolt and Parts Co.*, 19 CIT 13, 21 (1995), as support for the proposition that because the Complaint alleged grossly negligent and negligent violations which were nearly time-barred at the time the prepenalty notice was sent, the abbreviated period given to Brown to respond to the fraud claims in that notice were ultimately justified. Plaintiff's Response at 40, 41. While the Government claims that the relevant facts in that case are similar to the one at bar, the two are significantly different. In *Ziegler Bolt*, Customs alleged negligence or gross negligence as to all but one entry in the prepenalty notice, and for some of the entries the statute of limitations could have been asserted as a defense within one year. *Id.* at 14 n.1, 21. The defendant argued that it should have had 30 days to respond to allegations involving the entries that were not due to expire. *Id.* at 20-21. The Court held that because the statute of limitations could have been asserted as a defense to some entries, Customs was justified in accelerating the time period within which defendant could respond to the prepenalty notice as a whole. *Id.* at 21.



prepenalty notices. Brown's notice alleged only fraud, and there were four years left before the statute of limitations may have been asserted as a defense to that charge. The purpose of having procedures specially designed for the prepenalty notice period is defeated if later developments in a case can justify how those procedures were carried out. Plaintiff's interpretation of 19 C.F.R. § 162.78(a) does not comport with its plain meaning or its purpose, and it is not supported by precedent.

## 2

#### DEFENDANT DID RECEIVE DUE PROCESS AT THE ADMINISTRATIVE LEVEL

The Court is not required to grant Defendant's Motion to Dismiss this case simply because Plaintiff did not technically comply with its prepenalty notice guidelines. *United States v. Roteck, Inc.*, No. 97-08-01311, 1998 WL 314028, at \*5 (CIT 1998) ("the court must focus not on a rigid application of [an] agency's regulations, but rather, on whether the defendant was afforded sufficient opportunity to be heard \* \* \*.") Because Defendant was ultimately given sufficient opportunity to be heard at the administrative level, Plaintiff's violation of its Customs regulations is not fatal to its case.<sup>25</sup>

In numerous cases, this Court has focused less on whether administrative guidelines were strictly followed during the prepenalty phase of an action brought under 19 U.S.C. § 1592, and more on whether the defendant was afforded "substantive and procedural due process" throughout the case as a whole. For instance, in *Ziegler Bolt*, 19 CIT at 21, after giving the defendant less than the required amount of time to respond to a prepenalty notice, Customs gave the defendant an extension of time to submit a petition protesting the proposed penalty and held a full hearing at which the defendant gave an oral presentation. Under those facts, the Court found that the defendant did have an opportunity to be heard. *Id.* See also *Kab Trade Co.*, 1997 WL 155397 at \*4 ("due process claim[s] must rest on the question of whether [defendants] had an adequate opportunity to be heard at the administrative level"); *United States v. Modes, Inc.*, 13 CIT 780, 786, 723 F.Supp 811, 816 (1989) (opportunity for defendant to make oral presentation, in combination with Customs' written decision in support of its conclusions, provided ample opportunity to achieve administrative remedies).

In *Obron*, 18 CIT 771, 862 F. Supp. 378 (1994), the defendant argued that its case was analogous to that of the defendants in *Chow* and *Stan-*

<sup>25</sup> Even if the Court determined that the shortened response time did deprive Defendant of due process, this Court would retain jurisdiction of Defendant's case: "failure to provide adequate notice or opportunity to participate at the administrative level is generally not perceived as a jurisdictional prerequisite to an enforcement action brought by the agency." *Jac Natoli Co.*, 17 CIT at 350, 821 F. Supp. at 1516-17 (citing *United States v. Priority Products, Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986)); *United States v. Maxi Switch, Inc.*, No. 97-08-01426, 1998 WL 466101 at \*5 (CIT 1998). As the Court recently noted in *Roteck*:

Because the present action arises under 19 U.S.C. § 1592 and is not specified in 28 U.S.C. § 2637(a)—(c), this court has discretion whether to waive the exhaustion requirement. See 19 U.S.C. § 2637(d); *United States v. Priority Products, Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986) ("Exhaustion of administrative remedies is not strictly speaking a jurisdictional requirement and hence the court may waive that requirement and reach the merits of the complaint.") Thus, the court must focus not on a rigid application of the agency's regulations, but rather, on whether the defendant was afforded sufficient opportunity to be heard so as to justify the court's retention of jurisdiction without further exhaustion of the administrative remedies.

1998 WL 314028 at \*5.



ley Works because, like the defendants in those cases, it (Obron) was erroneously given less than 30 days to respond to a prepenalty notice. Obron's situation, however, was significantly different. The defendants in *Chow* and *Stanley Works* were "forced to respond to their respective prepenalty and penalty notices in rapid fire succession," and in both cases Customs "failed to exhaust its administrative remedies and failed to provide the respective defendants with a fair opportunity to be heard." *Id.* at 776, 862 F. Supp. at 382-83. In addition, Customs "further abused the administrative process" in *Stanley Works* "by failing to take action for twenty-one months," after which it again sent the defendant truncated prepenalty and penalty notices. *Id.*, 862 F. Supp. at 383.

In contrast, though given a "truncated" response period in its prepenalty and penalty notices, "Obron was able ultimately to argue its case over a six-month period." *Id.*, 862 F. Supp. at 382. Obron was given a month after responding to the prepenalty notice to prepare and present an oral argument and submit an appraisal/worksheet for consideration. *Id.* Customs also gave Obron a month after responding to the penalty notice to make an oral presentation, and permitted it to provide Customs with a supplemental submission in support of its petition for mitigation and remission. *Id.* "The number of opportunities which Obron had to present its case and the lengthy time period within which these presentations were made" led the Court to conclude that "Obron was afforded its due process rights at the administrative level." *Id.* As such, Customs' failure to rigidly apply its regulations and to provide a thirty-day response period in Obron's prepenalty and penalty notices amounted to no more than "harmless error." *Id.*

Brown's case is more akin to *Obron*, *Kab Trade Co.*, and *Modes* than to *Chow* and *Stanley Works*. While the defendant in *Chow* "complained bitterly that he was not given adequate time to prepare," Brown responded early to his prepenalty notice,<sup>26</sup> and did not mention time constraints in his response. *Chow*, 17 CIT at 1376, 841 F. Supp. 1289; Plaintiff's Exhibit I. The defendants in *Chow* and *Stanley Works* were allowed only 7 days to respond to their penalty notices; Brown does not complain about his penalty notice, and the record does not indicate how long he was given to respond to that notice. Customs apparently responded in detail to Brown's petition seeking mitigation of the penalty assessed in the penalty notice.<sup>27</sup>

<sup>26</sup> The prepenalty notice, dated March 15, 1993, stated that Defendant's response "must be made within seven (7) days from the date of mailing of this pre-penalty notice \* \* \*." Plaintiff's Exhibit H. Defendant's response is dated March 19, 1993. Plaintiff's Exhibit I.

<sup>27</sup> Defendant's petition seeking mitigation of the proposed penalty is not included in the record; nor is Customs' response to Brown. Plaintiff's Exhibit J, a letter from the International Trade Compliance Division of the U.S. Customs Service to the District Director of Customs in Buffalo, New York, makes reference to Defendant's petition and addresses in detail the allegations it purportedly makes. In the letter the writer orders the Buffalo office to quickly provide Brown's counsel with a copy of its decision; while Plaintiff's Response suggests that such was provided to Brown, no documentation contained in the record supports that claim. See Plaintiff's Response at 37.

Brown was then apparently given the opportunity to file a supplemental petition pursuant to 19 C.F.R. § 171.33.<sup>28</sup> While Brown asked for and received three extensions of time, the supplemental petition was never submitted.<sup>29</sup> Defendant was not prejudiced by the shortened response time he was given in his prepenalty notice: he was given sufficient opportunity to be heard, and he did not exhaust the administrative remedies available to him. Under the circumstances, the abbreviated response time given to Defendant to respond to his prepenalty notice nearly five years ago was a harmless procedural error which does not require this Court to dismiss this case.

# F

## THE STATUTE OF LIMITATIONS BARS THE GOVERNMENT'S COMPLAINT AS TO CLAIMS WHICH ACCRUED MORE THAN FIVE YEARS PRIOR TO BROWN'S FIRST WAIVER OF LIMITATIONS

Defendant argues that the statute of limitations bars the Government's claims that are based upon grossly negligent or negligent acts which occurred more than five years prior to August 10, 1993. Defendant's Motion to Dismiss at 14-16. Defendant bears only the initial burden of production to show that the Government's claims are time-barred in connection with extinguished causes of action; the burden then shifts to the Government to show that the extinguished claims are actionable by virtue of some exception to the statute of limitations. *United States v. Hitachi America, Ltd.*, 964 F. Supp. 344, 388 (CIT 1997). In this case, Defendant meets his burden by demonstrating that he expressly excluded from his first waiver of the statute of limitations any claims that were already barred at the time the waivers became effective. See Defendant's Exhibit 3. The Government does not carry its burden of persuasion. Its argument is invalid that the limitation period was tolled while Defendant was in Canada.

19 U.S.C. § 1621 imposes a five year limitation period on claims involving violations of 19 U.S.C. § 1592 which arise out of gross negligence or negligence. See discussion *infra* p. 36. The limitation period begins running on the date of the alleged violation. 19 U.S.C. § 1621.

The first grossly negligent or negligent violation that Plaintiff alleges Defendant committed took place on September 11, 1987. See Compl. at ¶ 9; Exhibit A. Almost six years later, Defendant executed a waiver of the statute of limitations which the Government accepted for a two-year period beginning on August 10, 1993. See Defendant's Exhibit 3. A comparable waiver was subsequently executed and accepted through August 10, 1997. *Id.* Both waivers state that "it is expressly understood that this waiver does not apply to any entries for which the statute of limitations

<sup>28</sup> Plaintiff's Response contends Defendant was informed of its right to file a supplemental petition in its copy of the Customs decision referred to in footnote 27 above. See Plaintiff's Response at 37.

<sup>29</sup> Plaintiff's Exhibit K is one such request, dated August 9, 1993; Plaintiff's Exhibit L is a letter from a Fines, Penalties and Forfeitures Officer granting that request, dated August 13, 1993. Plaintiff's Exhibit M is a letter from the same officer to Brown's attorney dated October 6, 1993, responding to and granting what was apparently another request for an extension of time; it gave Defendant until March 10, 1995, or 30 days following the resolution of criminal proceedings (whichever came first) to submit a supplemental petition. Plaintiff's Exhibit N makes passing reference to another apparent request for time which was granted and which extended the deadline to April 14, 1995.

had already run." *Id.* The plain language of the statute, Complaint, and waiver indicate that Plaintiff's gross negligence and negligence claims which are based upon acts which occurred between September 9, 1987, and August 9, 1988, (52 entries) are time-barred. *See* schedules attached as Exhibits to the Complaint.

Plaintiff argues that the statute of limitations does not apply in this case. It cites the exception to the limitation period found in 19 U.S.C. §1621(2): "the time of the absence from the United States of the person subject to the penalty or forfeiture \* \* \* shall not be reckoned within the 5-year period of limitation." Brown was in Canada when the alleged violations of Section 1592 took place, and he has been there since. Thus, the Government argues, Brown has been "absent" from the United States, and the limitations period has been tolled. Plaintiff's Response at 42-49.

The Government argues that the language of the statute is unambiguous on its face, and that the obvious definition of "absence from the United States" is "being away from the United States," *i.e.*, not being physically present within the borders of the United States." *Id.* at 46.

This interpretation of "absence" does not comport with the word's plain meaning and common usage. *Black's Law Dictionary* states that "absence" is "[t]he state of being absent, removed, or **away from one's domicile, or usual place of residence.** Not present at particular time." *Black's Law Dictionary* 8 (6th Ed. 1990) (emphasis added). In *Webster's Third New International Dictionary*, "absence" is: "1: the state of being absent or **missing** from a place or from companionship: **failure to be present** \* \* \* 2: failure to be present (as in an accustomed place) or where one is needed, wanted, or **normally expected** (frequent [absence]s from a job) \* \* \*." *Webster's Third New International Dictionary* 6 (1993) (emphasis added). These definitions for the most part define "absence" as the state of being away from a place where one usually is, or is expected to be. Brown was not "missing" from the United States because he was not normally found there or expected to be there. To use an everyday analogy, one is not "absent" from a class in which one was never enrolled.

The Government's proposed definition of "absence from the United States" conforms better to the phrase "outside the United States." In *Black's Law Dictionary*, "outside" is defined as "[t]o the exterior of; without; outward from." *Black's, supra*, at 1102. Brown was indeed "without" the United States for the entire period in question.

The distinction between the words "outside" and "absence" is illustrated in other provisions of the United States Code. Section 6531 of Title 26 provides that the limitations period for certain tax evasion offenses is tolled for the period during which the defendant is "outside the United States or is a fugitive from justice \* \* \*." "Outside" simply means "without." Later in the provision, a reference is made to "the time during which a person committing an offense is absent from the district wherein the same is committed \* \* \*." The word "absent" refers

to no longer being in a place where one once was. 18 U.S.C. § 2441, a provision dealing with war crimes, refers explicitly to one who, "whether inside or outside the United States, commits a war crime \* \* \*." "Outside" here clearly indicates that the person involved need never have set foot in the United States.

Courts have used the words "absence" and "outside" in a similar fashion. In *Matter of Extradition of Sven Ulf Ingemar Assarsson*, 687 F.2d 1157 (8th Cir.1982), the Court used the word "absence" to refer to one who had left his "usual place of abode." *Assarsson* at 1162 n.9. That court cites another case in which the court was concerned with determining the reason for the accused's absence **from his native country**. *Id.*, (citing *Jhirad v. Ferrandina*, 536 F.2d 478, 483 (2d Cir. 1976)) (emphasis added). In *United States v. Myerson*, 368 F.2d 393, 395 (2d Cir. 1966), the Court characterizes as "absence from the country" time that the defendant spent in other countries, away from his home in the United States. Plaintiff does not cite a single case in which the word "absent" is used in the context of a foreign resident.

The weight of the evidence favors an interpretation of "absence" which does not include foreign residents like Defendant. Plaintiff certainly did not act as though it believed that the statute of limitations was tolled: it sought and received two waivers of the statute of limitations from Defendant, and it now argues that Defendant's prepenalty notice period needed to be shortened because the statute of limitations "may be asserted as a defense" in this case. Customs undoubtedly deals on a regular basis with foreign defendants accused of customs violations, yet Plaintiff cannot point to a single illustrative instance in which the statute of limitations for a Section 1592 offense was tolled because a foreign defendant was deemed "absent" from the country.

Finally, Plaintiff argues that its interpretation of "absence" is better from a policy standpoint. The statute of limitations for foreign residents, it says, should be tolled because,

The ability to investigate those who are outside the United States is hampered by the fact that the Government must often rely upon the cooperation of another sovereign state before a potential defendant may be interviewed or before any of his relevant documents may be examined. Absent such cooperation, it may be impossible to conduct a thorough investigation of an entity that lies beyond our borders, in stark contrast to the Government's ability to engage the full panoply of investigative resources and powers that are available within the United States pursuant to United States law.

Plaintiff's Response at 44. Plaintiff cannot, however, contend that the foreign government involved in this case was not cooperative: Plaintiff itself cites, in another context, the Mutual Assistance Agreement, in which the United States and Canada agree that the customs administrations of the two countries are to "assist each other in the prevention, investigation, and repression of offenses." Plaintiff's Exhibit D, Agreement Between the United States of America and Canada Regarding Mutual Assistance and Co-operation Between Their Customs Ad-

ministrations, June 20, 1984, U.S.-Can., T.I.A.S. 11253, Art.2, ¶1(a). Plaintiff cannot argue that it had trouble serving Defendant in this case: it has known all along where Brown was and how to commence a suit against him. Indeed, Plaintiff argues that the methods of service available at its disposal were simple and varied. Plaintiff's Response at 6-16.

Congress revised 19 U.S.C. § 1621 in 1978 to create a new, more lenient statute of limitations for violations of section 1592 arising out of gross negligence or negligence. See H.R. Conf. Rep. No. 95-1517 (1978), reprinted in 1978 U.S.C.C.A.N. 2249. While the limitations period for fraud still commenced on the date of discovery of the fraud, suits brought to enforce Section 1592 penalties arising out of gross negligence or negligence now have to be brought within five years after the violation occurred. *Id.* The clear intent of Congress was to benefit unintentional violators of customs laws, whose mistakes had occurred over five years ago and had escaped attention. The plain language of 19 U.S.C. § 1621 indicates that Brown falls under that change in the law. He is not a fugitive who fled the United States to conceal himself and avoid suit—he is a foreign resident who lives outside the United States. It is nonsensical to toll Brown's limitations period because of his "absence" from the United States: he never lived here.

## V

### CONCLUSION

Brown's Motion to dismiss all negligence and gross negligence claims arising more than five years before August 10, 1993, is granted. It is denied in all other respects.

## ABSTRACTED CLASSIFICATION DECISIONS

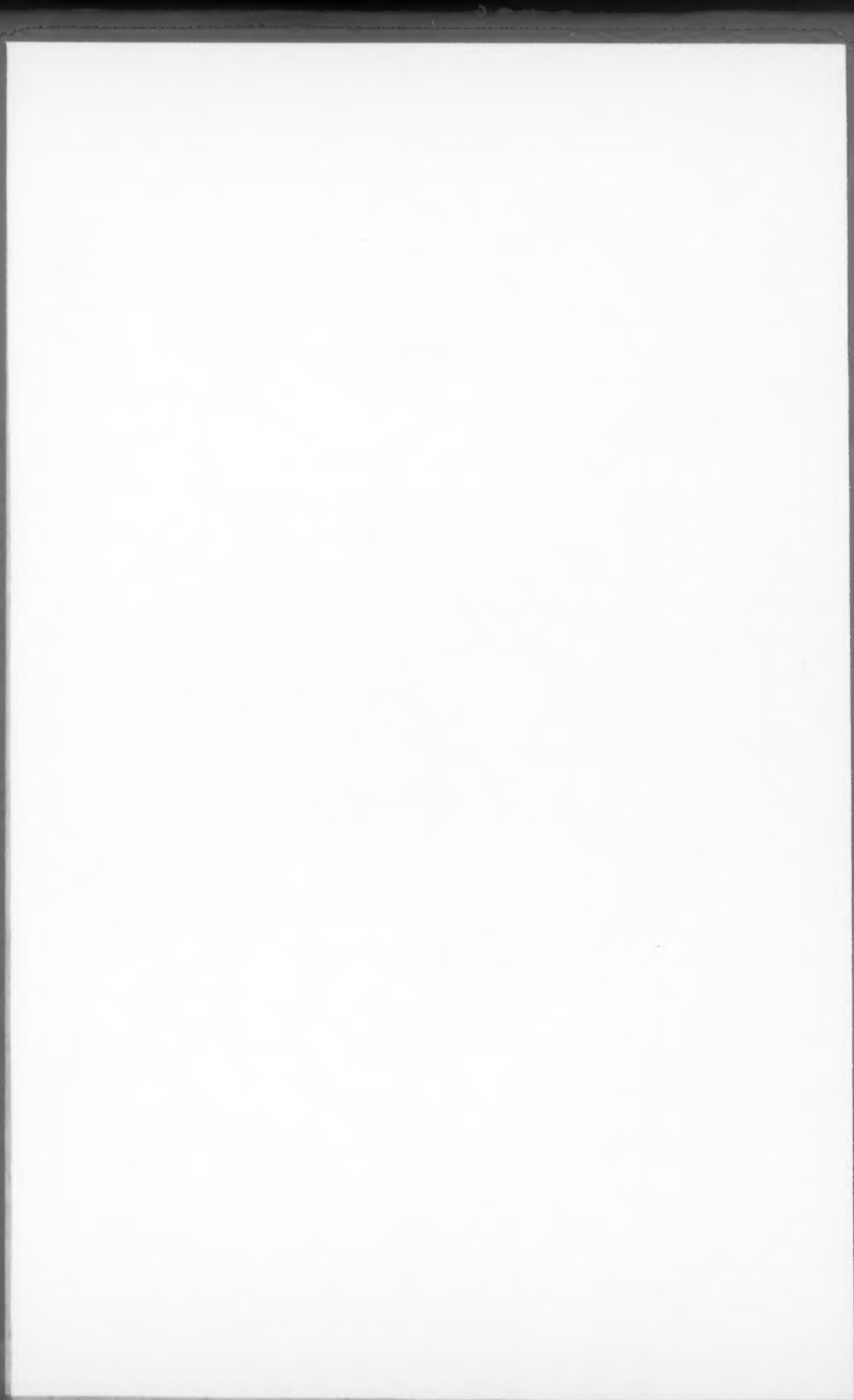
DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C98/117 8/20/98 Newman, S.J.	Marubeni America Corp.	92-7-00439	7407.10.10 Not stated	7411.10.10 1.5%	Agreed statement of facts	Los Angeles, Seattle Copper tubes
C98/118 8/20/98 Newman, S.J.	Marubeni America Corp.	93-8-00518	7407.10.10 Not stated	7411.10.10 1.5%	Agreed statement of facts	Los Angeles, Seattle, New York Copper tubes
C98/119 8/20/98 Goldberg, J.	Xerox Corp.	91-4-00285	3707.90.30 8.5%	8473.30.40 Free 9009.90.50 Free and 3.9% 3707.90.30 Free	Agreed statement of facts	Atlanta Parts and accessories of electrostatic photocopiers and laser printers
C98/120 8/20/98 Goldberg, J.	Xerox Corp.	91-6-00470	3707.90.30 8.5%	8473.30.40 Free 9009.90.50 Free and 3.9% 3707.90.30 Free	Agreed statement of facts	Atlanta Parts and accessories of electrostatic photocopiers and laser printers
C98/121 8/20/98 Goldberg, J.	Xerox Corp.	91-6-00471	3707.90.30 8.5%	8473.30.40 Free 9009.90.50 Free and 3.9% 3707.90.30 Free	Agreed statement of facts	Buffalo Parts and accessories of electrostatic photocopiers and laser printers
C98/122 8/20/98 Goldberg, J.	Xerox Corp.	91-8-00599	3707.90.30 8.5%	8473.30.40 Free 9009.90.50 Free and 3.9% 3707.90.30 Free	Agreed statement of facts	Buffalo, Los Angeles Parts and accessories of electrostatic photocopiers and laser printers

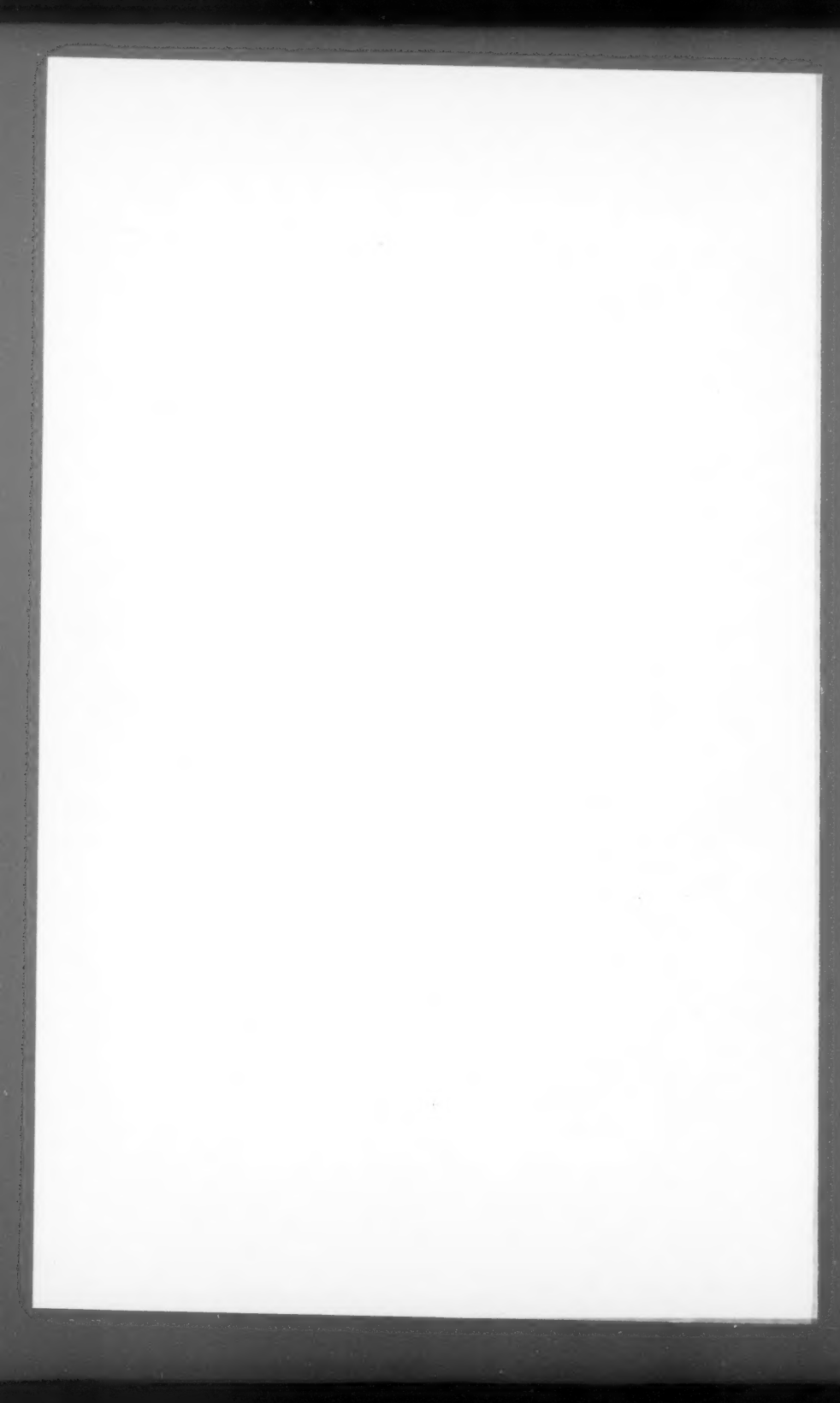
C98/123 8/20/98 Goldberg, J.	Xerox Corp.	92-2-00073	3707.90.30 8.5%	8473.30.40 Free 9009.90.50 Free and 3.9% 3707.90.30 Free	Agreed statement of facts	Buffalo Parts and accessories of electrostatic photocopiers and laser printers
C98/124 8/20/98 Goldberg, J.	Xerox Corp.	92-2-00074	3707.90.30 8.5%	8473.30.40 Free 9009.90.50 Free and 3.9% 3707.90.30 Free	Agreed statement of facts	New York Parts and accessories of electrostatic photocopiers and laser printers
C98/125 8/20/98 Goldberg, J.	Xerox Corp.	92-6-00379	3707.90.30 8.5%	8473.30.40 Free 9009.90.50 Free and 3.9% 3707.90.30 Free	Agreed statement of facts	Buffalo, Los Angeles Parts and accessories of electrostatic photocopiers and laser printers
C98/126 8/20/98 Goldberg, J.	Xerox Corp.	92-9-00621	3707.90.30 8.5%	8473.30.40 Free 9009.90.50 Free and 3.9% 3707.90.30 Free	Agreed statement of facts	Buffalo, New York Parts and accessories of electrostatic photocopiers and laser printers
C98/127 8/20/98 Goldberg, J.	Xerox Corp.	92-11-00759	3707.90.30 8.5%	8473.30.40 Free 9009.90.50 Free and 3.9% 3707.90.30 Free	Agreed statement of facts	Los Angeles, Dallas Parts and accessories of electrostatic photocopiers and laser printers
C98/128 8/20/98 Goldberg, J.	Xerox Corp.	93-7-00411	3707.90.30 8.5%	8473.30.40 Free 9009.90.50 Free and 3.9% 3707.90.30 Free	Agreed statement of facts	Los Angeles, Dallas Parts and accessories of electrostatic photocopiers and laser printers



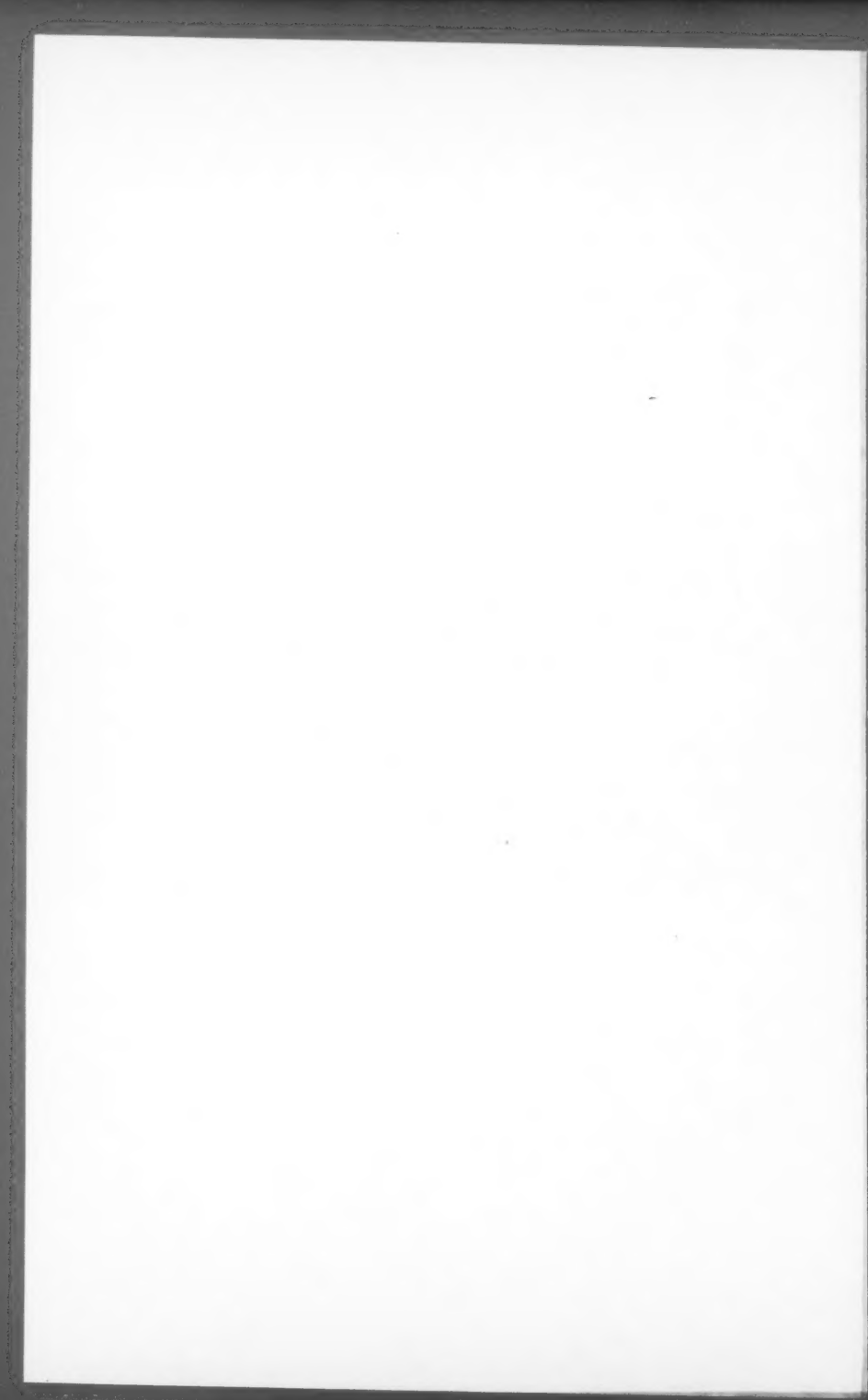
## ABSTRACTED CLASSIFICATION DECISIONS—Continued

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C98/129 8/20/98 Goldberg, J.	Xerox Corp.	94-3-00183	3707.90.30 8.5%	8473.30.40 Free 9009.90.50 Free and 3.9% 3707.90.30 Free	Agreed statement of facts	Buffalo, New York, Parts and accessories of electrostatic photocopiers and laser printers
C98/130 8/20/98 Goldberg, J.	Xerox Corp.	94-9-00548	3707.90.30 8.5%	8473.30.40 Free 9009.90.50 Free and 3.9% 3707.90.30 Free	Agreed statement of facts	Buffalo, New York, Parts and accessories of electrostatic photocopiers and laser printers
C98/131 8/20/98 Goldberg, J.	Xerox Corp.	95-1-00018	3707.90.30 8.5%	8473.30.40 Free 9009.90.50 Free and 3.9% 3707.90.30 Free	Agreed statement of facts	New York, Parts and accessories of electrostatic photocopiers and laser printers
C98/132 8/20/98 Goldberg, J.	Xerox Corp.	95-1-00020	3707.90.30 8.5%	8473.30.40 Free 9009.90.50 Free and 3.9% 3707.90.30 Free	Agreed statement of facts	Buffalo Parts and accessories of electrostatic photocopiers and laser printers
C98/133 8/25/98 Restani, J.	Monin, Inc.	95-12-01776	2106.90.94 Not stated	2106.90.99 9.4%	Agreed statement of facts	Tampa Flavored syrups
C98/134 8/31/98 Carman, C.J.	Pyramid Handbags	96-8-01844	4202.32.3000 20%	4202.32.1000 12.1e/kg + 4.6%	Agreed statement of facts	New York, Terminal Island, CA Coin purses and wallets









# Index

*Customs Bulletin and Decisions*  
*Vol. 32, No. 38, September 23, 1998*

## *U.S. Customs Service*

### General Notice

	Page
Modification of ruling letter relating to tariff classification of neodymium-iron-cobalt alloy ingots .....	1

## *U.S. Court of International Trade*

### Slip Opinions

	Slip Op. No.	Page
International Light Metals v. United States .....	98-122	19
International Union v. Robert Reich .....	98-103	7
Sea-Land Service, Inc. v. United States .....	98-123	34
U.S. Vinadium Corp. v. United States .....	98-124	34
United States of America v. David Islip .....	98-125	35

### Abstracted Decisions

	Decision No.	Page
Classification .....	C98/117-C98/134	62



Federal Recycling Program  
Printed on Recycled Paper

U.S. G.P.O. 1998-432-394-80002

